(26,533)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1066.

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA AND MARY E. BUTLER AND ALBERT NELSON BUTLER, A MINOR, BY MARY E. BUTLER, HIS GUARDIAN *AD LITEM*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. MAY 28, 1918

1 In the Supreme Court of the State of California.

S. F. No. 8583.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Petition for Writ of Review.

A. L. Clark, Henley C. Booth, Attorneys for Petitioner.

Filed this 30th day of November, 1917. B. Grant Taylor, Clerk, by Erb, Deputy Clerk.

2 In the Supreme Court of the State of California.

S. F. No. —.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Petition for Writ of Review.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of California:

Your petitioner, Southern Pacific Company, respectfully applies to the above entitled Court for a writ of review for the purpose of having determined the lawfulness of an original award made by
3 the respondent, Industrial Accident Commission, in favor of Mary E. Butler, individually and as guardian ad litem for her minor child, Albert Nelson Butler, in the sum of $4,517.52, as a death benefit under the Workmen's Compensation Insurance and Safety Act of the State of California, Chapter 176 of the Laws of the State of California for the year 1913, as amended by Chapters 541, 607, and 662 of the Laws of said state of 1915, effective August 8, 1916; and also for the purpose of having determined the lawfulness of the denial by said Commission of this petitioner's application to said Commission for a rehearing in the matter of said award.

Herewith is filed a printed brief stating why in petitioner's opinion certiorari should issue and thereon said award be annulled.

I.

Your petitioner is, and at all times herein mentioned has been, a corporation organized and existing under laws of the State of Kentucky and engaged in the operation of a system of railroads as a common carrier of freight and passengers between and among the States of California and those states adjacent thereto, and as a part of said system, at all times mentioned herein, maintained and
4 has maintained in the county of Alameda, State of California, lines of railroad, the motive power for passengers, mail, baggage and express on which was and is electricity.

II.

Respondent Industrial Accident Commission was created under and by virtue of the Workmen's Compensation Insurance and Safety Act, hereinabove referred to.

III.

The respondents, Mary E. Butler and Albert Nelson Butler, a minor, by Mary E. Butler, his mother, as his guardian ad litem, were the applicants against the Southern Pacific Company before said California Industrial Accident Commission in the proceeding which resulted in the award hereinafter mentioned, and were the persons in whose favor said award was made, and are the only persons beneficially interested herein.

IV.

Annulment of the award is sought herein because:

(*a*) The award is based on the death of William T. Butler, an electric lineman, who was killed near Fruitvale, Alameda
5 County, California, while employed by Southern Pacific Company and in the course of his employment;

(*b*) He was killed (quoting from Commission's award) while "working on one of the main lines by which the electricity is transmitted" from petitioner's Fruitvale power station to petitioner's West Oakland and Berkeley substations, and when killed was "doing work that was necessary to keep said main electric lines in a workable and usable condition";

(*c*) Said electric line on which decedent was working was then and there an instrumentality of interstate commerce and decedent was "keeping in usable condition an * * * instrument then in use in such interstate transportation" (Shanks vs. D., L. & W. Ry., 239 U. S. 556) and he was engaged in keeping "instrumentalities in a proper state of repair while used in interstate commerce, which service is so closely related to said commerce as to be in practice and in legal contemplation a part of it." (Pedersen vs. D., L. & W. Ry. Co., 229 U. S. 146).

(*d*) The only ground upon which the Commission gave an award was that "the electricity which caused said electric shock had not reached its point of distribution to the said electric cars, and he was

employed in work preliminary to the running of said electric cars, and therefore he was not employed in interstate commerce" (quoting from Commission's award).

6 (*e*) The evidence and proceedings before the Commission show, without conflict or contradiction, the following facts and none other:

V.

On July 11, 1917, Mary E. Butler, for herself and for said Albert Nelson Butler, filed an application in due form with said Industrial Accident Commission, praying for an award in her favor and for the benefit of said Albert Nelson Butler against Southern Pacific Company on account of the death of her husband, William T. Butler, on June 21, 1917, by reason of an accident arising out of and in the course of his employment by Southern Pacific Company.

Thereafter said Southern Pacific Company duly answered in writing and specifically pleaded in said answer that it was at the time of said fatal accident a common carrier by railroad, engaged in commerce between and among the State of California and the states adjacent thereto, and that deceased, William T. Butler was, at the time of said accident, then and there employed by defendant, Southern Pacific Company, in such commerce and therefore that said Industrial Accident Commission had no jurisdiction over said application or claim.

7 Thereafter a hearing was had at which all parties were represented, and upon said hearing testimony was introduced and stipulations were made with respect to the issues raised by said application and said answer.

Thereafter, on September 20, 1917, said Commission, Commissioners A. J. Pillsbury and Will J. French concurring therein, and Commissioner Meyer Lissner not participating therein, gave and made an award in the sum and for the benefit of the persons hereinbefore stated;

That all of the findings of fact in said award and leading up thereto, material to the only question raised by this petition for a writ of review, were as follows:

"1. That William T. Butler, husband of Mrs. Mary E. Butler, one of the applicants herein, was injured on the 21st day of June, 1917, at Oakland, California, while in the employment of defendant, Southern Pacific Company, as an electric lineman.

"2. That said injury arose out of and happened in the course of said employment, was proximately caused thereby, and occurred while the injured employee was performing service growing out of and incidental thereto.

8 "3. That said injury occurred in the manner and under conditions and circumstances as follows: Said employee received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death on June 23, 1917; that at the time said employee sustained said injury the defendant maintained a main power house at or near Fruitvale, Alameda County, California; that at said power house the electricity used by defendant in the operation

of its electric cars in said Almeda County is manufactured and from said power house transmitted by main line to its West Oakland substation and to its Berkeley substation, at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the defendant on its different electric lines in said Alameda County; that the said employee at the time he received his said injury was working on one of the main lines by which the electricity is transmitted from said Fruitvale to West Oakland and Berkeley substations and was doing work that was necessary to keep said main electric lines in a workable and usable condition in order that the electricity might be transmitted as aforesaid; that
9 at the time of said injury the said defendant was a common carrier by railroad engaged in interstate commerce between different states of the United States; that said electric cars were used at the time of said injury for both interstate and intrastate commerce; that while said employee was working as aforesaid between said power house and said substation the electricity which caused said electric shock had not reached its point of distribution to said electric cars and he was employed in work preliminary to the running of said electric cars; and that, therefore, he was not employed in interstate commerce."

VI.

At said hearing of said application much testimony was introduced on the issue of whether or not at the time of said injury and death Southern Pacific Company was a common carrier by railroad, engaged in interstate commerce. Said Commission having found, as above, in defendant's favor on said issue, said testimony is not herein repeated.

All of the testimony and stipulations at said hearing bearing on or illustrative of the point here made, to-wit, that Butler was actually employed by an interstate carrier by railroad in interstate commerce at the time he was killed is as follows:

(Applicants were represented by E. S. Hurley and E. I.
10 Durrell. Southern Pacific Company was represented by A. L. Clark. The testimony was taken before Mr. Ratcliff, General Referee for said Commission.)

On said hearing there was first entered into a stipulation by applicants and defendants, as appears by said Commission's record, as follows:

"It is stipulated and agreed by and between the parties,

1. That William T. Butler was in the employment of the Southern Pacific Company on June 21, 1917;

2. That defendant employer did not carry compensation insurance;

3. That on June 21, 1917, at Oakland, California while in the course of his employment, William T. Butler received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injuries which resulted in his subsequent death on June 23, 1917;

4. That said injuries causing death arose out of and happened in the course of the employment and while the employee was performing service growing out of, incidental to and while acting in the course of the employment as such, and was not caused by his wilful misconduct or intoxication;

11 5. That medical treatment was furnished by the defendant;

6. That the defendant had notice of the happening of the injury within the time prescribed by law;

7. That the age of the deceased employee was 37 years and his occupation that of electric lineman;

8. That the average annual earnings of the deceased employee were $1508.84;

9. That no death benefit has been paid;

10. That this applicant, Mary E. Butler, and Albert Nelson Butler were the wife and son of said deceased, upon whom they were totally dependent for support at the time of said employee's death and that there are no other dependents;

11. That the burial expense of said deceased employee was $266.00, which was paid by the International Brotherhood of Electric Workers, said deceased being a member of that organization and that organization provides for the funeral expenses of its deceased members;

12. That the defendant Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and is engaged in the operation of a system of steam railroads as a

12 common carrier of freight and passengers for hire between the States of California, Oregon, Nevada, Utah, Arizona and New Mexico and was so engaged on June 21st, and prior thereto, 1917.

13. That at the time the deceased met his death that the Southern Pacific maintained what is known as a main power house at or near Fruitvale, Alameda County, California; that at this power house the electricity used by the Southern Pacific Company in the operation of its electric cars in Alameda County is manufactured and from said power house transmitted by main lines to its West Oakland substation and to its Berkeley substation, at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the Southern Pacific Company on its different electric lines in Alameda County, California; that the said deceased at the time he received his injury which produced his death was working on one of the main lines by which the electricity is transmitted from Fruitvale to West Oakland and Berkeley substations and was doing work that was necessary to keep said main electric lines in a workable and usable condition in order that the electricity might be transmitted.

It is stipulated and agreed between the parties to this pro-

13 ceeding that the Southern Pacific Company operates one electric line between Oakland Pier and Berkeley known as the Ellsworth Street Line; that it operates another electric line between Oakland Pier and Berkeley known as the Shattuck Avenue Line;

that it operates another electric line of railroad from Oakland Pier to Berkeley known as the California Street Loop; that it operates another electric line between Oakland Pier and Berkeley known as the Ninth Street Loop; that it operates an electric line of railroad which extends from Oakland Pier to Melrose and is known as the Seventh Street Loop; that it operates an electric line of railroad from Oakland Pier to Alameda, via Seventh Street and Fruitvale, that is known as the Horse Shoe line."

The Referee then stated the issue as follows which statement was agreed to by both parties and is contained in the record made by the Commission in the following language:

"The issue is whether or not the employment that applicant was engaged in at the time of his injury was such as to subject both employer and employee to the compensation provisions of the Workmen's Compensation Insurance and Safety Act and
14 to the jurisdiction of the Industrial Accident Commission."

The following testimony was then taken and is all of the testimony taken with respect to the sole issue involved in this petition.

J. Johansen, called as a witness by defendant, testified as follows:

"My address is Fruitvale, California. I am an employee of the Southern Pacific Company in the capacity of chief operator of electric power in Fruitvale power staton and substations at West Oakland and Berkeley. I have held that position since the inauguration of the electric system in May, 1911. All of our electric power is originally manufactured in the Fruitvale power station and is transmitted by the three main lines from the Fruitvale power station to the West Oakland substation and the Berkeley substation. That power that is transmitted over the three main lines from Fruitvale station to West Oakland substation and to Berkeley substation is the electricity which is reduced and carried into the trolley wires for the movement of all the electric cars for the Southern Pacific in Alameda County."

15 VII.

Said Commission has never modified, annulled or made any order with respect to said award of September 20, 1917, except the order denying rehearing hereinafter referred to.

On the 9th day of October, 1917, said Southern Pacific Company, deeming itself directly aggrieved by said award of said Commission, applied in writing to said Commission for a rehearing in the matter of said award on the ground that the facts found by the Commission showed upon their face, as a matter of law, that the defendant was at the time of said injury engaged in interstate commerce, and that the deceased was then and there employed in such commerce, and that the conclusion of the Commission that said deceased was only employed in work "preliminary to the running of said electric cars" was unsustained by the evidence and incorrect as a matter of law. Said application was further made on the ground that any cause of action that existed in favor of the bene-

ficiaries of said decedent was covered solely by the Federal Employer's Liability Act. Said application was served forthwith on all adverse parties. No answer thereto was filed by any adverse party or parties. Said application for rehearing set forth specifically
16 and in full detail the grounds upon which the applicant considered said award unjust and unlawful and each issue to be considered by the Commission on said application. Said application was verified under oath in the manner required for verified pleadings in the Courts of record in said States and contained a general statement of all evidence and other matters upon which the applicant relied in support thereof.

Thereafter, and on November 8, 1917, said Industrial Accident Commission filed and served a written order denying said petition for rehearing. The portions of said order material to this petition are as follows:

"A petition for rehearing having been filed on behalf of the defendants, Southern Pacific Company, claiming that this Commission erred in holding that the injury and death which forms the basis of this procedure were governed by the California Workmen's Compensation Insurance and Safety Act instead of by the Federal Employers' Liability Act, and

It appearing that said issue of jurisdiction is the only issue raised by said petition, and that the facts as stated by said petition are substantially as found by this Commission and that the argument therein presented is insufficient to convince this Commission that its conclusion upon said facts is erroneous,
17 It is hereby ordered that said petition for rehearing be and the same hereby is denied."

Said original award and said order denying rehearing have not been added to or amended by said Commission.

VIII.

Your petitioner has not paid any amount for or on account of said award, nor has your petitioner compromised or settled any claim or claims arising out of the death of said William T. Butler. Your petitioner is solvent and entirely responsible for the amount of said award and desires a stay and suspension of the operation of the same, and believes and alleges that terms and conditions on such suspension are, by reason of your petitioner's solvency and the facts herein stated, unnecessary.

IX.

The reason this application is made originally to this Court is that by the provisions of said Workmen's Compensation and Safety Act, your petitioner is given the option of applying either to this Court or to the District Court of Appeals of First Appellate District for the purpose of obtaining a writ of review. Wherefore your peti-
18 tioner prays:

1. That, pending the review herein petitioned for, this

Court, under the provisions of Section 85-B of said Workmen's Compensation Insurance and Safety Act, stay and suspend the operation of the award sought to be reviewed herein.

2. That a writ of review issue out of this Court commanding said respondent Industrial Accident Commission to certify fully to this Court at a specified time and place a transcript of the record and proceedings in the matter of said application of Mary E. Butler et al., applicants, vs. Southern Pacific Company, defendant, Application No. 4510, before the Industrial Accident Commission, that the same may be reviewed by this Court and requiring said respondents in the meantime to desist from further proceedings in the matter to be reviewed;

3. And for such other and further orders and relief as may be proper.

Dated November 12th, 1917.

[SEAL.] SOUTHERN PACIFIC COMPANY,
T. O. EDWARDS,
Assistant Secretary.
HENLEY C. BOOTH,
A. L. CLARK,
Attorneys for Petitioner.

19 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

T. O. Edwards, being first duly sworn, deposes and says: I am assistant secretary of petitioner, Southern Pacific Company, the company above named; I have read the foregoing petition and know the contents thereof; the facts therein stated are true except as to the matters therein stated on information and belief, and as to such matters I believe the same to be true.

T. O. EDWARDS..

Subscribed and sworn to before me this 19th day of November, 1917.

[SEAL.] E. B. RYAN,
Notary Public in and for the said City and County.

20 By the COURT:

Ordered that a writ of review issue as prayed for in the within petition, returnable before the Court in bank, at its court room, in San Francisco, on Monday, January 7, 1918, at ten o'clock A. M.

Further ordered that in addition to the service required by law, copies of the within petition and of this order be served on Mary E. Butler and Albert Nelson Butler, a minor, named therein as parties beneficially interested at least ten days before January 7th, 1918.

Further ordered that pending the determination of this proceeding the enforcement of the award complained of be and the same is hereby suspended.

ANGELLOTTI, *C. J.*

Due service and receipt of a copy of the within is hereby admitted this —— day of November, 1917.

—— ——,
—— ——,
Attorneys for Respondents.

Dated December 3, 1917.

Filed Dec. 3, 1917. B. Grant Taylor, Clerk. By Erb, Deputy.

21 In the Supreme Court of the State of California.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Writ of Review.

The People of the State of California to the Industrial Accident Commission of the State of California:

Whereas, It manifestly appears to us by the affidavid of T. O. Edwards, on behalf of said petitioner, as the party beneficially interested, that in a certain proceeding pending before you, entitled Mary E. Butler and Mary E. Butler as guardian ad litem of Albert Nelson Butler, a minor, against the Southern Pacific Company, you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being, therefore, willing to be certified of the said proceeding:

We, therefore, command you, that you certify and send to our Supreme Court, at the courtroom thereof, in the Wells-Fargo Building, in the city and county of San Francisco, state of California, on the 7th day of January, A. D. 1918, at ten o'clock in the morning of said day, annexed to the writ, a transcript of the record and proceedings in the action aforesaid, with all things touching the same, as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our Supreme Court, and that our Supreme Court may further cause to be done thereupon what it may appear of right ought to be done; and in the meantime we command and require you to desist from further proceedings in the matter so to be
21½ reviewed.

Witness, the Honorable Frank M. Angellotti, chief justice

of our Supreme Court, at San Francisco, California, this 3rd day of December, A. D. 1917.

By the court.

[SEAL.]

B. GRANT TAYLOR,
Clerk.

By I. ERB,
Deputy.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

A. J. McKenna, being first duly sworn, deposes and says: I am a citizen of the United States, over the age of twenty-one years, and not interested in or a party to the within entitled proceeding. On the 5th day of December, 1917, in the county of Alameda, state of California, at 1610 East 37th St., Fruitvale, I personally served the foregoing writ on Mary E. Butler individually and as guardian ad litem of Albert Nelson Butler, a minor. I then and there delivered to and left with her personally a copy of said writ, together with two copies of the petition for said writ, the order authorizing the issuance of said writ, and petitioner's points and authorities filed with said petition.

A. J. McKENNA. [SEAL.]

Subscribed and sworn to before me this 6th day of December, 1917.

[SEAL.]

E. B. RYAN,
Notary Public in and for City and County of San Francisco, State of California.

Service of the within Writ of Review and of two copies of the Petition and order for said Writ, and Petitioner' Points and Authorities on Application for said Writ, is hereby accepted this 4th day of December, 1917.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA,
By CHRISTOPHER M. BRADLEY.

22 Filed Dec. 8, 1917. B. Grant Taylor, Clerk, By Dryden, Deputy.

23 In the Supreme Court of the State of California.

S. F. No. 8583.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents; Mary E. Butler and Albert Nelson Butler, Applicants.

Return to Writ of Review.

Filed Jan. 7, 1918. B. Grant Taylor, Clerk By Ramage, Deputy.

Christopher M. Bradley, 525 Market St., San Francisco, Counsel for Respondents.

24 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mrs. MARY E. BUTLER, His Guardian ad Litem, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

I, H. L. White, Secretary of the Industrial Accident Commission of the State of California, hereby certify that the attached is a full, true and correct copy of record of proceedings had before the Industrial Accident Commission in the above-entitled cause.

Attest my hand and the seal of the Industrial Accident Commission of the State of California.

[SEAL.]

H. L. WHITE,
Secretary.

Dated at San Francisco, California, this 21st day of December, 1917.

25 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mrs. MARY E. BUTLER, His Guardian ad Litem, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

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26 Industrial Accident Commission of the State of California, 525 Market Street, San Francisco.

Form No. 34.

Industrial Accident Commission of the State of California.

NOTE.—Under the provisions of the Workmen's Compensation, Insurance and Safety Acts the applicant need only state the general nature of the claim in controversy. Full particulars should be given, but an application will not be held invalid by reason of any defect. This form is intended to assist the applicant and to suggest all necessary particulars. Either party may be represented in person, by attorney or other agent. When application has been filled out and signed

by the applicant, the original, together with one copy for each party to the controversy, should be filed with or mailed to the Industrial Accident Commission of the State of California, 525 Market Street, San Francisco.

This application must be filled out in every possible detail.

See Chapter 176, Laws of 1913, Chapters 541, 607, and 662, Laws of 1915, and Chapter 586 of Laws of 1917.

Claim No 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, Applicant-,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

Application for Adjustment of Claim.

The petition of the above-named applicant respectfully shows to your Honorable Commission as follows:

I.

That on the 21st day of June, 1917, William Thomas Butler
Name of person injured
was killed by reason of an accident arising out of and in the course
Killed or injured
of his employment by the above-named Southern Pacific Company.
Name of employer

That your petitioner is the widow person injured.
If applicant is a dependent, state relationship.

II.

That a question has arisen with respect to the compensation to be paid therefor and the general nature of the claim in controversy is as follows, to wit:

Give the date that employer refused to pay the compensation demanded, and state briefly the exact matter in dispute, as for example:

Give the date that employer refused to pay the compensation demanded, and state briefly the exact matter in dispute, as for example:

(A) Employer denies liability for compensation; or

(B) A dispute has arisen concerning the amount or duration of the compensation payable.

(A) Employer apparently claims that the injury and death occurred while the employee was engaged in interstate commerce.

27 III.

That the following is a statement of particulars relative to this application:

1. Name of injured employee: William Thomas Butler.
Address: 708 29th St., Oakland.
Occupation: Lineman.
Age: 37.
2. Name of employer: Southern Pacific Co.
Address: —.
Place of business: S. F.
Business address: —.
3. Name and address of all other parties to this application and reason why each party is joined: Albert Nelson Butler, a minor son of deceased.
Name and address of employer's insurance carrier, if known: —.
4. Place of accident: Near Fruitvale Depot on 7th Street line, Oakland.
5. Nature of work on which injured person was engaged at time of accident: Cleaning insulators.
6 How did accident occur? (Describe in detail) A shock of electricity caused him to fall to the ground, sustaining internal injuries.
7. Nature of injury. (Describe in detail.) —.
8. Has injured person fully recovered? Death proximately occurred June 23, 1917.
If so, when? —.
When did injured person return to work? —.
9. Particulars of disability, whether total or partial, and estimated duration thereof. If death resulted, so state, giving date of death.
10. Was medical and surgical treatment required? Yes.
Was it furnished by employer? Yes.
If not, did employer have opportunity to furnish it?
11. Names and addresses of attending physicians: S. P. Hospital, San Francisco.
12. Wages of employee at time of accident. (State whether paid by day, week, month, or year). $5.00 dollars per day.
How long did injured person work for this employer at this wage prior to the accident? —.
State whether employment was for 5, 5½, 6, 6½, or 7 days per week: 6 days.
13. Amount injured person is earning, or is able to earn in some suitable employment or business after the accident. $— per week; $— per month.
28 14. Payment, allowance or benefit received from employer. None for — weeks' medical care and attendance.
15. Additional amount claimed as compensation: $— for — weeks' medical care and attendance.
Death benefit for total dependency. (Itemize expenditures made by you for this purpose): $ — per week for — weeks' disability.
16. *When* was the employer notified of the accident? Yes.

17. If employer was not notified within thirty days after date of accident, give reason for failure to notify him: —.

18. If application is filed to adjust claim for death, state name, address and relationship of all dependents. If to adjust claim for medical attendance or funeral expenses, state name and address of all other such creditors and amount of claims, if known.

(In case of death of employee this paragraph must be filled out completely.)

Name: Mrs. Mary E. Butler, widow. Age: —.

Address: 708 — 29th St., Oakland.

Name: Albert Nelson Butler, minor son, aged 6 years.

Address: Same.

Name: Funeral expenses in amount exceeding $100 was paid by International Brotherhood of Electrical Workers.

Name: —. Age: —.

Addrsss: —.

IV.

(Here state any further facts that may be desired: —.

Hearing may be held either in Oakland or San Francisco.

Wherefore your petitioner prays, that the above-named defendant be required to answer this petition, that a time and place be fixed for hearing hereof and due notice thereof given, and that upon such hearing, an order or award be made by your Honorable Commission granting such relief as the said applicant- may be entitled to in the premises.

Dated at San Francisco, this 11th day of July, 1917.

(Signed) MRS. MARY E. BUTLER,
ALBERT NELSON BUTLER,
By MARY E. BUTLER,

Address: 708 — 29th St., Oakland.

Applicant represented by E. S. Durrel, 387 — 12th St., Oak. To whom send notices.

Industrial Accident Commission, State of California. Filed July 11, 1917. By H. L. White, A. B.

29 [Endorsed:] No. —. Industrial Accident Commission of the State of California. —— ——, Applicant, vs. —— ——, Defendant. Application.

Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, Applicant,

vs.

—— ——, Defendant.

Notice of Hearing of Application for Adjustment of Claim.

Industrial Accident Commission State of California. Filed July 14, 1917. By H. L. White, A. B.

The People of the State of California send Greeting to Mrs. Mary E. Butler and Albert Nelson Butler, a minor, applicants, and Southern Pacific Company, defendant:

You are hereby notified that the application of Mrs. Mary E. Butler, entitled as above, to adjust a claim for compensation arising out of the death of William Thomas Butler (a copy of which is attached hereto), has been filed in the office of the Industrial Accident Commission of the State of California, 407 Underwood Building, 525 Market Street, San Francisco, California. You are further notified that said application has been set for hearing at The City Hall (15th St. entrance, 2d floor, upstairs), at Oakland, Calif., on the 24th day of July, 1917, at 10:30 o'clock A. M., and that at said time and place the Industrial Accident Commission of the State of California will proceed to hear and dispose of the said application in the manner provided by law:

Dated at San Francisco, California, this 14th day of July, 1917.

Witness:

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA,
By H. L. WHITE,
Secretary.

Rule I.

(2) Answer—The Answer, if any, of the defendant must be filed within five days after the service of the Application upon any such defendant, and shall set forth the facts upon which he intends to rely by way of defense. A copy of such Answer must be served forthwith by such defendant upon all adverse parties. The Answer must contain denials or admissions of every material statement in the Application.

Rule II.

Service of Pleadings and Notices and Proof Thereof—Any pleading, notice or document may be served either by delivering to and

leaving with the person to be served a copy thereof or by mailing to such person a copy thereof in a sealed envelope with the postage thereon fully prepaid, addressed to such person at his last known place of business or residence. Personal service, if made, must be made by a person over the age of eighteen years.

Proof of service may be made by the affidavit or oral testimony of the party making such service.

In addition to the above, service and proof of service may be made in any manner provided by the Code of Civil Procedure of this State.

NOTE.—Either party shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as may be pertinent. (Workmen's Compensation, Insurance and Safety Act, Section 24, Chapter 176, Laws 1913).

31 STATE OF CALIFORNIA,
State and County of San Francisco, ss:

—— ——, being duly sworn, deposes and says: That -he is an employee of the Industrial Accident Commission of the State of California, that -he served the foregoing notice on the applicant- and defendant-, hereinafter mentioned, at the time set opposite their respective names, by depositing a copy of said notice, attached to a copy of the application therein mentioned, in a sealed envelope in the United States mail on said day, at San Francisco, California, with the postage thereon fully prepaid, and addressed to the said applicant- and defendant-, at their last known places of business or residence, as follows, to wit:

Names of parties served: —— ——.

Date of service: —.

—— ——,
Signature.

Subscribed and sworn to before me this — day of ——, A. D. 191—.

—— ——,
Secretary.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

—— ——, being duly sworn, deposes and says: That he is, and was at the times of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within-entitled proceeding; that he personally served the within notice on the hereinafternamed defendants, by delivering to and leaving with each of said defendants personally, in the County of ——, State of California, at the times set opposite their respective names, a copy of said notice attached to a copy of the application referred to in said notice.

Names of parties served: —— ——.

Date of service: —.

—— ——,
Signature.

Subscribed and sworn to before me this — day of ——, A. D. 191—.

—— ——,
Secretary.

[Endorsed:] No. —. Industrial Accident Commission of the State of California. —— —— Applicant, vs. —— ——, Defendant. Notice of Hearing of Application for Adjustment of Claim.

32 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendants.

Notice Changing Date of Hearing.

Good cause appearing therefore,

It is hereby ordered that the hearing in the above entitled cause set for the City Hall, Oakland, California on the 24th day of July, 1917 at 9:30 A. M. be changed, *tehs* is hereby set for and will be held at the Industrial Accident Commission Room, Room 211, City Hall, Oakland, California (15th Street Entrance, upstairs) on the 27th day of July, 1917 at 2 P. M.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA,
By H. L. WHITE,
Secretary.

Dated at San Francisco, California this 16th day of July, 1917.

Industrial Accident Commission, State of California. Filed July 16, 1917. By H. L. White, A. B.

Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

Industrial Accident Commission, State of California. Filed July 19, 1917. By H. L. White, A. B.

Answer.

Comes now the defendant, Southern Pacific Company, and for answer to the application herein admits and alleges as follows:

I.

Admits that William Thomas Butler was employed by this defendant as an electric lineman on and prior to June 21, 1917; that on June 21, 1917, while in the course of his employment, he received an electric shock while wiping insulators, which caused him to fall, producing injuries which resulted in his death; that at said time he was thirty-seven years of age, and his wages were Five Dollars a day, working six days a week.

II.

Admits that Mary E. Butler is the widow of said deceased, and that Albert Nelson Butler is a son of the deceased.

III.

Further answering, defendant alleges that it is and at all times herein mentioned was a corporation organized under laws of the State of Kentucky, and that it is engaged in the operation of a system of railroads as a common carrier of freight and passengers for hire,
34 between the States of California, Oregon, Nevada, Utah, Arizona and New Mexico; that as a part of its system of steam railroads, and in connection therewith, it operates a system of electric railroads extending from Oakland Pier to Berkeley, Oakland, Fruitvale, and Alameda, in the County of Alameda, State of California.

IV.

Alleges that one of said lines of electric railroads extends from Oakland Pier to Berkeley, and is known as the Ellsworth Street

Line; that another of said lines of electric railroad extends from Oakland Pier to Berkeley, and is known as the Shattuck Avenue Line; that another of said lines of electric railroad extends from Oakland Pier to Berkeley, and is known as the California Street Loop; that another of said lines of electric railroad extends from Oakland Pier to Berkeley, and is known as the Ninth Street Loop; that another of said lines of electric railroad extends from Oakland Pier to Melrose, and is known as the Seventh Street Line; that another of said lines of electric railroad extends from Oakland Pier to Alameda via Seventh Street and Fruitvale, and is known as the Horseshoe Line; that in the operation of said lines of railroad defendant transports passengers from points in other States than California to Berkeley, Oakland, Melrose and Alameda, and that tickets are sold at Berkeley and at Alameda, and passengers travel on such tickets from said points to points in other States of the Union than California, and that a part of their transportation is over said electric lines.

V.

Defendant further alleges that in the operation of its Shattuck Avenue line from Oakland Pier to Berkeley it is engaged in the transportation of freight moving in interstate commerce; that all freight originating in States other than California, destined to Berkeley, is moved by the defendant over its line of steam railroad to Oakland, from which point it is moved over said electric line to Berkeley. Likewise goods and merchandise originating at Berkeley and destined to points in other States than California are forwarded from Berkeley over said line to Oakland, and thence by steam railroad to ultimate destination.

VI.

Defendant alleges that it has provided itself with necessary power stations and sub-power-stations for the furnishing of electricity used in the operation of its said electric cars on said electric lines; that its main power station is located at Fruitvale; that one of its sub stations is located at West Oakland, and that, in order to furnish the electricity used in propelling said electric cars, it is necessary that the electricity manufactured and produced at the Fruitvale power house be transmitted to its West Oakland sub station, from which point it is transmitted to the trolley wires used in the operation of its cars.

VII.

That at the time said deceased met his death he was engaged in wiping insulators to which was attached the main transmission line by which the electricity was conducted from said Fruitvale power station to said West Oakland sub power station; that the line upon which he was working carried the current of electricity which was later transformed into energy for moving electric trains on all of

said electric lines above described; that at the time said deceased met his death he was engaged in keeping in usable and workable condition said transmission lines, which were necessary instrumentalities for the carrying of the electricity by which said electric lines were operated; that he was at said time engaged in interstate commerce, or in an act so directly connected therewith as to form a substantial part thereof.

Wherefore, defendant prays that said application be dismissed.

A. L. CLARK,
Attorney for Defendant.

36 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

MRS. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mrs. Mary E. Butler, His Guardian Ad Litem, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendants.

Summary of Testimony.

Hearing at Room 211, City Hall, Oakland, California, on Friday, July 27, 1917, at 2 P. M.

Present, W. P. Ratliff, General Referee.

Applicants not present but represented by E. S. Hurley, 778 19th Street, Oakland, California, and E. I. Durrell, 2398 East 27th Street, Oakland, California.

Defendant represented by A. L. Clark, attorney-at-law.

Witnesses:	Page
G. E. Gaylord	5
William H. Norton	6
E. A. Mitchell	7
F. S. Howard	8
C. J. Bowles	9
J. Johanson	10

Ten, fifteen and eight days given for filing of briefs. Case then to be submitted.

L. C. PEDROTTA.

37 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mrs. Mary E. Butler, His Guardian Ad Litem, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendants.

Testimony.

Be it remembered, That pursuant to orders duly made and entered, this cause came on regularly for hearing before the Industrial Accident Commission of the State of California, at Room 211, City Hall, Oakland, California, on Friday, the 27th day of July, 1917, at 2 o'clock P. M.

Present, W. P. Ratliff, General Referee.

Applicants, Mrs. Mary E. Butler and Albert Nelson Butler, not present but represented by E. S. Hurley, 778 19th Street, Oakland, California, and E. I. Durrell, 2398 East 27th Street, Oakland, California.

Defendant, Southern Pacific Company, represented by A. L. Clark, attorney-at-law.

38 It appearing that applicant Albert Nelson Butler is a minor and it appearing that Mary E. Butler, the mother, is a suitable person to be appointed guardian ad litem for said applicant, Now, Therefore,

It is hereby ordered that said Mary E. Butler be and she is hereby appointed guardian ad litem for the purposes set forth in sections 16 and 75 of the Workmen's Compensation, Insurance and Safety Act. This order of appointment being made subject to the approval of the Industrial Accident Commission.

It is stipulated and agreed by and between the parties,

1. That William T. Butler was in the employment of the Southern Pacific Company on June 21, 1917;

2. That defendant employer did not carry compensation insurance;

3. That on June 21, 1917, at Oakland, California, while in the course of his employment, William T. Butler received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injuries which resulted in his subsequent death on June 23, 1917;

4. That said injuries causing death arose out of and happened in the course of the employment and while the employee was performing service growing out of, incidental to and while acting in the course of the employment as such and was not caused by his wilful misconduct or intoxication;

5. That medical treatment was furnished by the defendant;

6. That the defendant had notice of the happening of the injury within the time prescribed by law;

39 7. That the age of the deceased employee was 37 years and his occupation that of electric lineman;

8. That the average annual earnings of the deceased employee were $1,505.84;

9. That no death benefit has been paid;

10. That this applicant Mary E. Butler and Albert Nelson Butler were the wife and son of said deceased upon whom they were totally dependent for support at the time of said employee's death and that there are no other dependents;

11. That the burial expense of said deceased employee was $266.00 which was paid by the International Brotherhood of electric workers, said deceased being a member of that organization and that organization provides for the funeral expenses of its deceased members;

12. That the defendant Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and is engaged in the operation of a system of steam railroad as a common carrier of freight and passengers for hire between the States of California, Oregon, Nevada, Utah, Arizona and New Mexico, and was so engaged on June 21, and prior thereto, 1917.

13. That at the time the deceased met his death that the Southern Pacific maintained what is known as a main power house at or near Fruitvale, Alameda County, California; that at this power house the electricity used by the Southern Pacific Company in the operation of its electric cars in Alameda County is manufactured and from said power house transmitted by main lines to its West Oakland sub-station and to its Berkeley sub-station, at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the Southern Pacific Company on its dif-

40 ferent electric lines in Alameda County, California; that the said deceased at the time he received his injury which produced his death was working on one of the main lines by which the electricity is transmitted from Fruitvale to West Oakland and Berkeley sub-stations and was doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted.

Subsequent Stipulations.

It is stipulated and agreed between the parties to this proceeding that the Southern Pacific Company operates one electric line between Oakland Pier and Berkeley known as the Ellsworth Street Line; that it operates another electric line between Oakland Pier and Berkeley known as the Shattuck Avenue Line; that it operates another electric line of railroad from Oakland Pier to Berkeley known as the California Street Loop; that it operates another electric line between Oakland Pier and Berkeley known as the Ninth Street Loop; that it operates an electric line of railroad which extends from Oakland Pier to Melrose and is known as the Seventh Street Loop; that it operates

and electric line of railroad from Oakland Pier to Alameda, via Seventh Street and Fruitvale, and is known as the Horse Shoe Line.

It is stipulated that no main steam line train coming in from the East passes the Shattuck Avenue Station in Berkeley.

It is stipulated that ticket Form 6, marked Defendant's Exhibit "B", gives the same privilege as Form 576, entitling the passenger to ride from Berkeley to Oakland Sixteenth Street or Oakland Pier.

41 The issue is whether or not the employment that applicant was engaged in at the time of his injury was such as to subject both employer and employee to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of the Industrial Accident Commission.

G. E. GAYLORD, whose address is Oakland Pier, California, a witness called on behalf of defendant, being first duly sworn, testified in substance as follows:

That he is employed by the Southern Pacific Company as assistant superintendent of the Western Division and has held that position since July 1, 1916, prior to that being train master of the Oakland District for about eight years. That the suburban electric lines in Alameda County are operated by the Southern Pacific Company and the only way that a freight shipment can reach Berkeley is by way of West Oakland freight yard in a main line train, where it is there broken up by yard engines and then delivered to Ward Street Station, Berkeley, which is set aside for the handling of freight consigned to Berkeley proper, the distance being entirely over the electric suburban lines. Freight shipments originating at Berkeley would be brought over the electric lines into the West Oakland yard where it would be transferred. There is a combined freight and ticket agency at Berkeley, Mr. Mitchell having charge of both freight and passenger station. This station is known as a coupon office and tickets are sold to all points in the United States. Persons buying tickets at Berkeley

42 to any point in the United States would have to ride over the electric lines to Oakland Sixteenth Street or Oakland Pier and at that point would take the steam train. There is a ticket agency at Melrose and a freight and passenger ticket agency at Alameda and Fruitvale. Passengers buying tickets at Melrose to points on the main line would travel out of Melrose on the Melrose suburban electric train. Freight service is operated on the electric line from Fruitvale to Melrose.

WILLIAM H. NORTON, whose address is Oakland Pier, California, a witness called on behalf of defendant, being first duly sworn, testified in substance as follows:

That he is employed by the Southern Pacific Company as assistant superintendent of electric lines and has held that position since 1913. That the main Berkeley ticket and freight office of the Southern Pacific Company is located at the corner of Shattuck and University Avenues. Passengers buying tickets at Berkeley destined to some point on the main line of the Southern Pacific, either in California or elsewhere would leave Berkeley by the electric train and transfer at Oakland Sixteenth Street or Oakland Pier to the steam train. All

freight shipments into Berkeley pass over the electric line. Passengers coming to Melrose from points in states other than California or main line points in California would reach that point by electric trains on the Seventh Street Line from Oakland Pier or from Fruitvale station, as the case may be. Tickets are sold at Melrose to Nevada and other states. The electric cars carry United States mail, baggage and express. Passengers buying tickets at Alameda destined to some point on the main line either in California or
42½ some other state would travel from Alameda by electric train to Fruitvale or Oakland Pier and then transfer to the main line.

E. A. MITCHELL, whose address is Berkeley, California, a witness called on behalf of defendant, being first duly sworn, testified in substance as follows:

That he is employed by the Southern Pacific Company as freight and passenger agent at Berkeley and has held that position since January 1, 1908. That the Berkeley passenger office is located at Center and Shattuck and the freight station is located about ten blocks south at Ward Street. There are tariffs which fix and name the passenger rates from Berkeley to points in California and other states and tickets are sold at the Shattuck Avenue Station to all points in the United States quoted by the tariff. Fully 70% of the passengers who buy tickets at Shattuck Avenue, Berkeley, travel over the electric lines to Oakland Sixteen- Street or Oakland Pier. Coupons similar to Exhibit "A" are attached to tickets sold at Shattuck Avenue to points on lines other than the Southern Pacific, and similar stubs but of a different form number are attached to local tickets on the main line. There is an average of 50 inbound shipments of freight per day, 10 of those being interstate shipments. Freight coming into Berkeley comes in on the steam line as far as Sixteenth Street and is then transferred to the Shattuck Avenue electric Line to Ward Street. A regular ticket office is also maintained at University Avenue Station where tickets are sold to all points covered by the tariff.

43 Coupon Form 576, which is attached to what is known as inter-line tickets or tickets to points outside of the State of California on railroads other than the Southern Pacific Company, offered and received in evidence as Defendant's Exhibit "A".

F. S. HOWARD, whose address is San Francisco, California, a witness cal-ed on behalf of defendant, being first duly sworn, testified in substance as follows:

That he is employed by the Southern Pacific Company as assistant chief rate clerk of the passenger department and has held that position since October, 1906. That the Southern Pacific Company maintains a ticket agency at Shattuck Avenue Station and tickets are sold at this station to all points in the United States. The Southern Pacific Company has filed with the Interstate Commerce Commission tariffs naming and fixing rates from Berkeley, Alameda and Melrose to different points in the United States. A coupon Form 576 (Defendant's Exhibit "A") is attached to tickets sold

at Berkeley destined to points in other states than California as well as local points in California entitling the passenger to ride from Berkeley to Oakland Sixteenth Street or Oakland Pier and there transfer to the main line train. There is also a coupon Form 6 which is substantially the same as Form 576. Passengers holding tickets purchased at points outside of California destined to Berkeley would have the entire ticket collected by the conductor on the main line train coming in to Oakland Pier and would be given a
44 ticket Form 972, entitling them to ride from Sixteenth Street or Oakland Pier to Berkeley. Alameda has a passenger ticket agent and tariffs have been made up and have been filed fixing and naming rates from Alameda to points in other states. In traveling either to or from Alameda passengers travel over the electric trains to Oakland Pier and there transfer to the steam line trains.

Coupon Form 6 is to be furnished the Commission by defendant and when received will be marked Defendant's Exhibit "B".

Coupon Form 972 is offered and received in evidence as Defendant's Exhibit "C".

C. J. BOWLES, whose address is Oakland Pier, California, a witness called on behalf of defendant, being first duly sworn, testified in substance as follows:

That he is employed by the Southern Pacific Company as head clerk of the transbay conductors' bureau and has held that position for five years. As chief clerk of that bureau he checks up all main line tickets, all tickets that are sold by agents on the electric lines to points reaching beyond the electric lines, and by the form number is able to tell whether they were attached to local or inter-
45 line tickets, form 576 being attached to all inter-line tickets.

J. JOHANSON, whose address is Fruitvale Power Station, Oakland, California, a witness called on behalf of defendant, being first duly sworn, testified in substance as follows:

That he is employed by the Southern Pacific Company as chief operator of electric power and has held that position since the inauguration of the electric system in May, 1911.

That all the electric power is originally manufactured at the Fruitvale power station and is transmitted by three main lines from there to the West Oakland sub-station and the Berkeley sub-station, and the electricity is reduced and carried in trolley lines for the movement of all the electric cars of the Southern Pacific Company in Alameda County.

Ten, fifteen and eight days given for the filing of briefs. Case then to be submitted.

L. C. PEDROTTA.

Industrial Accident Commission, State of California. Filed Aug. 7, 1917. By H. L. White, A. B.

46 DEF. EX. A.

Claim 4510.

G. U. M.

Southern Pacific Co. (Pacific System.)

Good for one first class passage
Berkeley or Fruitvale or Melrose or
Oakland (14th St.) or Alameda (High St.)
or any station intermediate thereto

to

Oakland Pier or San Francisco

or from

Berkeley or South Berkeley

to

Oakland (16th St.)

Good only when attached to ticket

From..... No.....

Subject to same time limit and conditions as ticket to which attached and forms a part

Void if detached

Form 576

32302

Exhibit "A."

47

Southern Pacific Co.

Berkeley to

Reno

Reno
Form 6.
1797.

As covered by coupons attached

Not good unless dated on back, and being sold at a reduced rate, good only for continuous passage on or one day after sale date.

Baggage liability limited to $100.

X X X

Pass'r Traffic Mgr.

Oakland Pier Oakland 16th St.

To Reno 2

Conductor will punch and lift this coupon with contract of ticket

---

1797

Form 6.

.....

Coupon 1

Berkeley to

Oakland Pier Oakland 16th St.

Conductor will punch and detach this coupon.

Valid when attached to contract of this ticket reading

Berkeley to Reno

1797

Form 6.

Exhibit "B".

48 S. P. Co. Conductor's Check

Oakland Pier to

Berkeley or Alameda

or from

Fruitvale to

West Oakland or Melrose or Alameda

Form 972 } No Baggage Privileges

X X X

Pass. Traf. Mgr.

900008

Exhibit "C."

49 Form 6 B. Portland.

1677. 7-15-15, 500, 1501-2000.

Agent's Stub.

Not Good for Passage.

Southern Pacific Company

(Pacific System.)

Special Limited Ticket.

Good for One Continuous First-Class Passage.

1677. Form. 6B.

Berkeley to Portland.

As covered by coupons attached.

Void After		
Jan.	Day	1
		2
		3
Feb.		4
		5
Mar.		6
		7
		8
		9
Apr.		10
		11
May		12
		13
		14
		15
June		16
		17
July		18
		19
		20
		21
Aug.		22
		23
Sep.		24
		25
		26
		27
Oct.		
Nov.		28
		29
Dec.		30
		31
1900		and
17		15
18		16

Subject to the Following Contract and Conditions:

1st. Limit. This Ticket will be void after midnight of date punched in margin hereof.

2nd. Stop-overs will not be allowed.

3rd. Non-Transferable. If presented by any person other than the original purchaser this ticket will be void and may be confiscated by any Agent or Conductor.

4th. Baggage liability is limited to wearing apparel not to exceed One Hundred Dollars.

5th. Alterations. This Ticket is void if more than one date is punched, or if any alterations or erasures are made hereon.

6th. Non-modification of Terms. No agent of employee has any power to alter, modify or waive any of the conditions named in this contract.

* * *,

Pass'r. Traffic Manager.

Coupon 2.

*Oakland Pier *Oakland 16th St.	to	Portland	

Conductors will punch and lift this coupon with contract of ticket.
Valid when attached to contract of this ticket reading Berkeley to Portland.

1677. Form 6 B.

Coupon 1.

Berkeley	to	Oakland Pier* Oakland 16th St.*	

Conductor will punch and detach this coupon.
Valid when attached to contract of this ticket reading Berkeley to Portland.

Exhibit "D."

50 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

MARY E. BUTLER and ALFRED NELSON BUTLER, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

The applicants in the above entitled case hereby reply to defendant who is seeking a rehearing in the above entitled application giving as a reason for their request, that tickets Form 6-B, from Berkeley to Portland, Oregon, may be formally introduced in evidence as defendant's Exhibit B.

Applicants hereby protest any further rehearing of this case and give as their grounds the following reasons:

That defendant had sufficient time in which to prepare the case; that their attorneys are men of experience who should know how to prepare evidence for cases of this nature; that defendant's agent at Berkeley testified that tickets were sold to Portland and that the defendant's attorneys should have seen to it that the agent brought such tickets as were necessary for evidence in their case at that time; that it is irrelevant and immaterial as to what form and number a ticket is designated. It was stipulated at the conclusion of the hearing by both parties heren referred to, that immediately after the sub-

mitting of the briefs, the evidence should be submitted to the Commission for its consideration.

Defendant's attorneys must have known at that time that this particular ticket which they refer to in their application for rehearing had not been introduced as evidence, and should have then
51 and there asked for a continuation of the hearing in order that they might submit this particular ticket for the consideration of the referee as to whether it should be admissible as evidence or not.

It appears now to applicants that defendant's attorneys have found some point in applicant's brief which they desire to overcome by the introduction of further testimony which should have been introduced at the hearing. This, to our mind, is contrary to all rules of procedure in civil matters.

We submit it is manifestly unfair for defendant to request a rehearing in this particular case, after agreeing to submit the evidence for the consideration of the Commission, for after the rehearing they might as easily request a second rehearing to introduce a ticket which might be form O-Z from Berkeley to Tucson, Arizona, and then again request a rehearing to introduce another form or number from Berkeley to El Paso, Texas.

We stand by the stipulation as agreed to by both parties and request that the case be now considered by the Commission.

E. S. HURLEY,
For Applicants.

Industrial Accident Commission. Filed Aug. 28, 1917. By H. L. White, S. J.

52 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

MRS. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by MRS. MARY E. BUTLER, His Guardian ad Litem, Applicants,

VS.

SOUTHERN PACIFIC COMPANY, Defendant.

Findings and Award.

This cause came on for decision by the Industrial Accident Commission of the State of California, at its offices at 525 Market Street, San Francisco, California, on Wednesday the 12th day of September, 1917, at 10 o'clock a. m.

Said decision was rendered upon testimony taken at a preliminary hearing held on the 27th day of July, 1917, at 2 o'clock p. m., at the City Hall, at Oakland, California, by W. P. Ratliff, General Referee.

At said preliminary hearing said applicants did not appear in person but were represented by E. S. Hurley, and by E. I. Durrell. Defendant was represented by A. L. Clark, attorney-at-law.

It appearing at said hearing that applicant Albert Nelson Butler is a minor and it appearing that Mary E. Butler, the mother, is a suitable person to be appointed Guardian ad litem for said applicant and the said Referee having made the following order to wit: "Now, therefore, it is hereby ordered that said Mary E. Butler be and she hereby is appointed Guardian ad Litem for the purposes set forth in Sections 16 and 75 of the Workmen's Compensation, Insurance and Safety Act,"

It is hereby ordered that said Order be and the same hereby is, confirmed.

53 Evidence having been introduced by all of the parties upon all of the issues and the cause submitted for decision, said Commission now makes its Findings of Fact and Award as follows:

Findings of Fact.

1. That William T. Butler, husband of Mrs. Mary E. Butler one of the applicants herein, was injured on the 21st day of June, 1917, at Oakland, California, while in the employment of defendant, Southern Pacific Company, as an electric lineman.

2. That said injury arose out of and happened in the course of said employment, was proximately caused thereby, and occurred while the injured employee was performing service growing out of and incidental thereto.

3. That said injury occurred in the manner and under conditions and circumstances as follows: said employee received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death on June 23, 1917; that at the time said employee sustained said injury the defendant maintained a main power house at or near Fruitvale, Alameda County, California; that at said power house the electricity used by defendant in the operation of its electric cars in said Almeda County is manufacured and from said power house transmitted by main line to its West Oakland substation and to its Berkeley substation at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the defendant on its different electric lines in said Alameda County; that the said employee at the time he received his said injury was working on one of the main lines by which the electricity is transmitted from said Fruitvale to West Oakland and Berkeley substations and was doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the

54 electricity might be transmitted as aforesaid; that at the time of said injury the said defendant was a common carrier by railroad engaged in interstate commerce between different states of the United States; that said electric cars were used at the time of said

injury for both interstate and intrastate commerce; that while said employee was working as aforesaid between said power house and said substation the electricity which caused said electric shock had not reached its point of distribution to the said electric cars and he was employed in work preliminary to the running of said electric cars; and that, therefore, he was not employed in interstate commerce.

4. That at the time of said injury the said employee was not engaged in any of the occupations or employments excluded by Section 14 of the Workmen's Compensation, Insurance and Safety Act from the provisions of said Act; and that said injury was not caused by the wilful misconduct or intoxication of the said employee.

5. That the said defendant employer had due notice of the sustaining of said injury within the time prescribed by law.

6. That the medical services required in the attempt to cure and relieve said employee from the consequences of his injury were furnished by the defendant.

7. That the burial expense of said deceased employee was two hundred sixty-six dollars ($266.00) which was paid by the International Brotherhood of electric workers, said deceased being a member of that organization and that organization provides for the funeral expenses of its deceased members.

8. That at the time of said injury the average annual earnings of the said employee were one thousand five hundred five dollars and eighty-four cents ($1,505.84) and that therefore his average weekly earnings were twenty-eight dollars and ninety-six cents ($28.96), and that 65 per cent thereof equals eighteen dollars and eighty-two cents ($18.62).

55 9. That Mrs. Mary E. Butler, one of the applicants herein, is the widow of the said deceased employee, William T. Butler, was living with him at the time of his injury and death, and was wholly dependent upon him for her support; that Albert Nelson Butler is the minor child of the said deceased employee and of the applicant Mrs. Mary E. Butler herein and was wholly dependent upon him for support at said time. That it is the judgment of this Commission that the whole amount of said death benefit should be made payable directly to the applicant Mrs. Mary E. Butler, individually, and as guardian ad litem for said minor child, Albert Nelson Butler; and that therefore said applicant Mrs. Mary E. Butler is entitled to a death benefit for the support of herself and the said minor child during his minority, in the sum of four thousand five hundred seventeen dollars and fifty-two cents ($4,517.52), which amounts to three times the average annual earnings of said deceased employee; that said death benefit is payable by defendant in weekly installments of eighteen dollars and eighty-two cents ($18.82) each; and that the total amount of said death benefit now accrued and payable for the period of twelve weeks commencing with the day after the death of said employee up to and including the 15th day of September, 1917, is the sum of two hundred twenty-five dollars and eighty-four cents ($225.84).

Award.

Now therefore, and in conformity with the foregoing Findings, Award is hereby made in favor of Mrs. Mary E. Butler, individually and as guardian ad litem for said minor child, and Albert Nelson Butler, applicants herein, against Southern Pacific Company, the defendant herein of a death benefit in the total sum of four thousand five hundred seventeen dollars and fifty-two cents ($4,517.52), payment thereof to be as follows:

56 1. To applicant Mrs. Mary E. Butler cash in hand the sum of two hundred twenty-five dollars and eighty-four cents ($225.84), this amount being the sum of weekly payments of said death benefit accrued up to and including the 15th day of September, 1917.

2. To applicant Mrs. Mary E. Butler the further sum of eighteen dollars and eighty-two cents ($18.82) per week, payable weekly in advance beginning with the 16th day of September, 1917, for the period of approximately two hundred twenty-eight consecutive weeks, thus completing the payments of said total sum of four thousand five hundred seventeen dollars and fifty-two cents ($4,517.52) herein awarded.

Provided, however, that if said applicant Mrs. Mary E. Butler dies before said minor child dies and before this award shall have been fully paid, the remainder of such payments due or unpaid after her death shall be paid by defendant to applicant Albert Nelson Butler, minor herein.

[SEAL.]

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA.
A. J. PILLSBURY,
WILL J. FRENCH,
Commissioners.

Dated at San Francisco, California, this 20th day of September, 1917.

Attest:

J. S. THOMAS,
Assistant Secretary.

Industrial Accident Commission State of California. Filed 9-20-17. By H. L. White, G. W.

57 Before the Industrial Accident Commission of the State of California.

Claim 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mrs. Mary E. Butler, His Guardian Ad Litem, Applicants,

vs.

SOUTHERN PACIFIC COMPANY, Defendant.

Testimony.

Be it remembered, That pursuant to orders duly made and entered, this cause came on regularly for hearing before the Industrial Accident Commission of the State of California, at Room 211, City Hall, Oakland, California, on Friday, the 27th day of July, 1917, at 2 o'clock P. M.

Present, W. P. Ratliff, General Referee.

Applicants, Mrs. Mary E. Butler and Albert Nelson Butler, not present but represented by E. S. Hurley, 778 19th Street, Oakland, California, and E. I. Durrell, 2398 East 27th Street, Oakland, California.

Defendant, Southern Pacific Company, represented by A. L. Clark, attorney-at-law.

Witnesses:	Page
G. E. Gaylord	5
William H. Norton	16
E. A. Mitchell	21
F. S. Howard	31
C. J. Bowles	39
J. Johansen	42

10, 15 and 8 days given for filing briefs. Case then to be submitted.

L. C. PEDROTTA.

58 It appearing that applicant Albert Nelson Butler is a minor and it appearing that Mary E. Butler, the mother, is a suitable person to be appointed guardian ad litem for said applicant, Now, Therefore,

It is hereby ordered that said Mary E. Butler be and she is hereby appointed guardian ad litem for the purposes set forth in sections 16 and 75 of the Workmen's Compensation, Insurance and Safety Act. This order of appointment being made subject to the approval of the Industrial Accident Commission.

It is stipulated and agreed by and between the parties,

1. That William T. Butler was in the employment of the Southern Pacific Company on June 21, 1917;

2. That defendant employer did not carry compensation insurance;

3. That on June 21, 1917, at Oakland, California, while in the course of his employment, William T. Butler received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injuries which resulted in his subsequent death on June 23, 1917;

4. That said injuries causing death arose out of and happened in the course of the employment and while the employee was performing service growing out of, incidental to and while acting in the course of the employment as such and was not caused by his wilful misconduct or intoxication;

5. That medical treatment was furnished by the defendant;

6. That the defendant had notice of the happening of the injury within the time prescribed by law;

59 7. That the age of the deceased employee was 37 years and his occupation that of electric lineman;

8. That the average annual earnings of the deceased employee were $1,508.84.

9. That no death benefit has been paid;

10. That this applicant Mary E. Butler and Albert Nelson Butler were the wife and son of said deceased upon whom they were totally dependent for support at the time of said employee's death and that there are no other dependents;

11. That the burial expense of said deceased employee was $266.00 which was paid by the International Brotherhood of Electric Workers, said deceased being a member of that organization and that organization provides for the funeral expenses of its deceased members;

12. That the defendant Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and is engaged in the operation of a system of steam railroad as a common carrier of freight and passengers for hire between the States of California, Oregon, Nevada, Utah, Arizona and New Mexico, and was so engaged on June 21st, and prior thereto, 1917.

13. That at the time the deceased met his death that the Southern Pacific maintained what is known as a main power house at or near Fruitvale, Alameda County, California; that at this power house the electricity used by the Southern Pacific Company is the operation of its electric cars in Alameda County is manufactured and from said power house transmitted by main lines to its West Oakland substation and to its Berkeley sub-station, at which point the electricity is reduced and transmited direct to the trolley wires which operate the

60 electric cars of the Southern Pacific Company on its different electric lines in Alameda County, California; that the said deceased at the time he received his injury which produced his death was working on one of the main lines by which the electricity is transmitted from Fruitvale to West Oakland and Berkeley substations and was doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted.

Subsequent Stipulations.

It is stipulated and agreed between the parties to this proceeding that the Southern Pacific Company operates one electric line between Oakland Pier and Berkeley known as the Ellsworth Street Line; that it operates another electric line between Oakland Pier and Berkeley known as the Shattuck Avenue Line; that it operates another electric line of railroad from Oakland Pier to Berkeley known as the California Street Loop; that it operates another electric line between Oakland Pier and Berkeley known as the Ninth Street Loop; that it operates an electric line of railroad which extends from Oakland Pier to Melrose and is known as the Seventh Street Loop; that it operates an electric line of railroad from Oakland Pier to Alameda, via Seventh Street and Fruitvale, and is known as the Horse Shoe Line.

It is stipulated that no main steam line train coming in from the East passes the Shattuck Avenue Station in Berkeley.

It is stipulated that ticket Form 6, marked Defendant's Exhibit "B", gives the same privileges as Form 576, entitling the passenger to ride from Berkeley to Oakland Sixteenth Street or Oakland Pier.

61 The issue is whether or not the employment that applicant was engaged in at the time of his injury was such as to subject both employer and employee to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of the Industrial Accident Commission.

(The following testimony was ordered transcribed September 24, 1917.)

G. E. GAYLORD, a witness called in behalf of defendant, being first duly sworn, testified as follows:

By referee:

Q. What is your address?
A. Oakland, Pier, California.
Q. Are you an employee of the Southern Pacific Company?
A. Yes, sir.
Q. In what capacity?
A. Assistant superintendent of the Western Division.
Q. How long have you been in that official position?
A. Since July 1, 1916.

Mr. Clark:

Q. Prior to July 1, 1916, what was your connection with the Southern Pacific Company?
A. I was train master of the Oakland District.
Q. For what length of time?
A. I could not say exactly as to dates, but for about eight years.
Q. As train master of the Oakland District, what lines did you have charge of or control of as train master.

62 A. From the yard limit sign just east of San Pablo on the Port Costa line, through Oakland terminal, the line through Tracy to Oakland by way of Miles, connecting with the Coast Division at Redwood, and the line from Oakland to San Jose via Newark.

Q. What is the fact about a system of electric railroads in Alameda County being operated by the Southern Pacific Company?

A. There is. Suburban electric lines are operated by the Southern Pacific Company under a superintendent separate from the Division organization of the Western Division.

Q. What is the fact as to whether or not a system of electric railroad in Alameda County operated by the Southern Pacific Company is operated in connection with its steam lines of railroad?

A. The organization of the steam lines or the Western Division operates the freight end of the terminal and the Oakland Yard limits take, encompass practically the entire electric suburban lines.

Q. What have you to say, Mr. Gaylord, about the transportation of freight from the steam lines to the electric lines and from the electric lines to the steam lines?

A. That is handled by yard engines within the limits of West Oakland yard and handled by the steam or Western Division organization. The yard is under the jurisdiction of the officials of the Western Division.

Q. Suppose there is a shipment of freight that comes into Oakland from any of the steam lines, either carload or less than carload, destined to Berkeley, by what line of railroad does that shipment reach Berkeley?

A. A carload of freight coming from any point on the main line consigned to Berkeley Station, that would mean the freight station or what we term Ward Street, has to come in West Oakland
63 freight yard in a main line freight train where it would be broken up by yard engines and then delivered from the West Oakland yard proper to the Ward Street yard in Berkeley by a switch engine. A portion of the distance would be entirely over the electric suburban lines.

Q. Which suburban electric line would that train move over from Oakland to Berkeley?

A. It would move over what is known as the Berkeley or Shattuck line as far as Ward Street Station.

Q. Where is Ward Street Station located?

A. It is located on—— I cannot give you the exact location as to the streets, but it is located on the—the switches leading to this Ward Street Station come off of the Shattuck Avenue line at—well, I cannot tell you exactly the name of the street.

Q. Whether or not that point is within the corporate limits of the town or city?

A. Yes.

Q. By what other means or other way could shipments reach the town of Berkeley?

A. There is no other way that it could get into that particular

portion of Berkeley set aside for the handling of freight consigned to Berkeley proper.

Q. In order to reach Berkeley proper it is necessary to *the* transported over the electric line?

A. Yes.

Q. By what means would a shipment of freight that originated at Berkeley move out of Berkeley and at what point be delivered to your main steam line railroad to be transported either to same point in California or some point in some other state than California?

A. Simply reverse the proposition I have just enumerated.
64 The shipment would be loaded at this freight station at Berkeley, picked up by yard engines, brought over the electric lines to Shellmound or possibly Sixteenth Street, depending upon the operating conditions at that time, and into the West Oakland yard where it would be switched into the outbound train and go on its way.

Q. Do you have a ticket agent in Berkeley?

A. Yes, sir.

Q. And a freight agent?

A. It is a combined freight and ticket agency at Berkeley. One man, Mr. Mitchell, is the agent at Berkeley, having charge of both the freight and passenger station. The freight and passenger stations are separate, that is, there is one station where a strictly passenger business is handled, and at the other point it is all freight.

Q. But the entire station, both freight and passenger, is under the supervision of Mr. Mitchell at Berkeley?

A. Yes, sir.

Q. And he has a sub-agent who works at one or the other place?

A. He has assistants at each place.

Q. What is the fact about tickets sold at Berkeley to points in California or to other lines in the United States?

A. That is known as a coupon office and we sell tickets to all points in the United States.

Q. If a person in Berkeley should buy a ticket to a point destined to some other state than California or California, either way, how would he travel from Berkeley and over what line?

A. Take the Shattuck Avenue train westbound, connecting with our main line train either at Oakland Sixteenth Street Station or at Oakland Pier.

Q. And at that point he would leave the electric car and take the steam train?

65 A. Steam train.

Q. What about a passenger coming into Oakland or Oakland Pier and he should buy a ticket entitling him to ride to Berkeley, how would he travel to Berkeley from Oakland or Oakland Pier?

A. Arriving either at Sixteenth Street or Oakland Pier on a main line train he would transfer to the Shattuck Avenue or any of the Berkeley lines, and in that way reach his destination in Berkeley.

Q. If you have the knowledge you can state whether or not tickets

are sold from points in states other than California as well as California points to Berkeley?

A. Yes, tickets are sold every day from Berkeley Station to different points in the country, to different states, and there are passengers arriving there every day on main line trains going into Berkeley. The record of course of those transactions is a station record. It could be produced and give the actual facts. What I am testifying to is a matter of knowledge of the business and what we do.

Q. I would, like you to state whether you have running between Oakland or Oakland Pier and Berkeley one line of electric railroad known as the Ellsworth Line?

A. Yes sir.

Q. You have another line of electric railroad from Oakland Pier to Berkeley known as the Shattuck Avenue line?

A. Yes sir.

Q. What is the fact as to whether or not there is a ticket agent at Melrose?

A. There is a ticket agency at Melrose and a ticket agent.

Q. And what about Alameda?

A. Yes sir, Park Street Station we have a freight and passenger ticket agency.

66 Q. And at Fruitvale?

A. At Fruitvale there is a freight and passenger agency maintained.

Q. State whether or not Melrose is located on any other line of railroad than the electric, that is, whether your steam line of railroad reaches Melrose?

A. Yes sir.

Q. Is the ticket office for the electric and steam lines at the same place?

A. Yes, we have a passenger station and just across the track is the freight house. It is one agency. One agent has charge of the station.

Q. Well, but does your steam line of railroad run from Melrose?

A. Yes sir, it is within the yard limits.

Q. Tickets sold at Melrose to points on your main line, by what system of railroad would the passenger travel out of Melrose?

A. On What is known as the Melrose suburban electric train.

Q. He would not board any passenger train on your steam line?

A. We have no steam line passenger traffic at Melrose. That comes under the head of the freight handling switch engine service.

Q. That freight service into Melrose, is that operated over the electric line, on the freight track of the electric line?

A. It is operated on the electric line from Fruitvale to Melrose. There is a switch at Sather they sometimes use but it is the same.

Q. State whether or not there are tickets sold at Melrose?

A. I am not positive of that. My impression is that it is not a

coupon office. I think that we only handle suburban tickets at Melrose proper.

Q. What would you say, or what have you to say about the
67 quantity or amount of freight that is transported to and from Berkeley per day, either carload or less than carload, whether it is limited or large?

A. There is a heavy freight business both going into and out of Berkeley, particularly at this time of the year the freight yards at that point are well filled. We have an engine that handles roughly eighteen to twenty carloads a day in and out of Ward Street Station. That includes both less than carloads and carloads.

Q. What about the passenger business in and out of Berkeley?

A. *W* wouldn't want to testify as to the amount of that. There is considerable of it. We have our records, our agency records, which would show conclusively just what tickets are sold there.

Mr. Hurley:

Q. Prior to become assistant superintendent you were train master?

A. Yes.

Q. The electric lines that have been mentioned in your former testimony were in existance at that time?

A. Yes.

Q. Did you have anything to do with them?

A. Not the electric lines.

Q. They were under a separate head?

A. Under a separate head.

Q. Operating freight from Berkeley to and from Oakland Mole, is handled entirely by steam, is it?

A. Yes sir.

Q. There is no electric locomotive used to haul freight to Berkeley?

A. No, all steam power.

Q. In transporting this freight the men handling it do not come in contact with the electric trolley wires at all in so far as the wires upon them for moving their trains is concerned?

68 A. No, steam power.

Q. Where is the main passenger station in Berkeley located?

A. What we call at University Avenue.

Q. That is on the main steam line of the Southern Pacific Railroad going from Oakland to Tracy, is it not?

A. University Avenue Station is at the foot of University Avenue and is on the main line of the Southern Pacific lines.

Q. That is known as the main Berkeley Station?

A. No, that is not the main Berkeley Station, that is known as the University Avenue Station. The main passenger station in Berkeley is the one on the electric lines where we maintain the biggest organization and that is our main passenger Station within the City of Berkeley.

Q. Isn't the passenger station at the foot of University Avenue

recognized by the Railroad Commission as the main passenger station in Berkeley?

A. I cannot say what it is recognized as by the Railroad Commission. I simply say it is not considered by the Railroad Company as the main station.

Q. Was there not a petition for the maintaining of a main passenger station at the foot of University Avenue?

A. I do not know.

Q. You admit there was a new passenger station constructed at the foot of University Avenue three years ago?

A. Yes, a new passenger station was constructed at that point.

Q. All transcontinental trains pass that point?

A. All coming in that arrive on the Port Costa line, yes.

Q. There are no transcontinental trains pass there at Shattuck Avenue?

A. No.

Q. A person purchasing a ticket in Nevada for Berkeley,
69 what would be their reason for going to Oakland Mole and go back on a local train when they could get off the main passenger station at the foot of University Avenue and go up to Berkeley in that way?

Mr. Clark: I object to the manner in which the question is put because he assumes that University Avenue is the main station when the witness has testified that it was not.

Mr. Hurley:

Q. Do not all transcontinental trains stop at the station at the foot of University Avenue?

A. No, sir.

Q. They do not?

A. No sir.

Q. If a passenger with a ticket bound for Berkeley desired to get off the station at the foot of University Avenue, would the transcontinental train not stop and let them off there?

A. No all of them. We have some trains that do not stop there at all.

Q. All transcontinental trains stop at Sixteenth Street?

A. Yes.

Q. But not at Berkeley, you say?

A. Not at University Avenue.

Q. To your knowledge, has there been a demand on the Southern Pacific Company by the Railroad Commission to stop all trains at University Avenue Station?

A. There has been a request on the Southern Pacific Company a number of times to stop trains which originated within the State of California at University Avenue.

Q. But was there not a demand on the part of the Railroad Commission to stop all railroad trains there?

70 A. Not since I have been assistant superintendent, and previous to that time I did not handle those things and wouldn't be able to testify positively as to that.

Q. The handling of freight to Melrose is handled in the same manner as it is to Berkeley?

A. Yes, sir.

Q. By steam engine?

A. Yes.

Q. By steam and not electric?

A. Yes.

Q. The handling of freight on all points destined to any station on the electric railroad is handled in the same manner by steam?

A. Wherever the delivery of freight is made on that portion of the yard limits within the electric zone, entirely, yes, sir.

Mr. Clark:

Q. Mr. Gaylord, what trains coming in from the East pass the University Avenue Station and from where do they come?

A. Ogden Line, trains from the Ogden gateway and from Portland and most of the train, most of the overland trains from the Los Angeles gateway pass University Avenue.

Q. Have you trains that are known as the "Sunset Limited" and the "Sunset Express"?

A. Yes, sir.

Q. Between what points do they run?

A. They run between Oakland and New Orleans.

Q. Both trains between Oakland and New Orleans, or is one of them from San Francisco to New Orleans?

A. The train that leaves here that goes to New Orleans is known as our "No. 110," leaves here and goes to San Jose by way of Fruitvale and Newark on the Coast Division, what is known as the Coast Line.

71 Q. And in like manner the train from New Orleans?

A. Yes, daily, "17."

Q. Suppose a passenger on a train comes to Oakland Pier on this train that is known as the "Sunset Express" from New Orleans or some point west of there, would he pass through Berkeley on the main line train?

A. He would not.

Q. What would it be necesary for him to do when he got to Oakland Pier in order to reach Berkeley?

A. He would have to take the suburban train, one of the electric line trains running to Berkeley.

Q. What is the fact as to whether or not the electric trains carry U. S. mail?

A. They do.

Q. What about express?

A. Also.

Q. What about baggage?

A. Baggage also.

Q. This baggage can originate in California or it can originate from some other point where the passenger starts from and go through?

A. Yes sir.

Mr. Hurley:

Q. A person coming from New Orleans by way of San Jose to Oakland Pier station with a ticket to Berkeley could just as easily take the steam train to Berkeley, could they not, to University Avenue Station?

A. It would be possible, yes.

Mr. Clark:

Q. To University Avenue?

A. University Avenue.

Q. But to no other part of Berkeley?

72 A. To no other part of Berkeley.

Mr. Hurley:

Q. Delivering a person at University Avenue Station, which is in Berkeley, the Southern Pacific would have completed the contract with the ticket holder, would it not?

A. Why, I presume they would. Yes, if the passengers were satisfied if he landed in town.

Q. They would have completed the contract in landing them in Berkeley?

A. They have their choice, the ticket reads "Berkeley" and it is their privilege and their choice.

WILLIAM H. NORTON, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

By Referee:

Q. What is your address?

A. Oakland Pier, California.

Q. Are you an employee of the Southern Pacific Company?

A. Yes, sir.

Q. In what capacity?

A. Assistant superintendent of electric lines.

Q. How long have you been such?

A. Assistant superintendent since 1905 but until 1913 was on the steam lines, but since then on the electric.

Mr. Clark:

Q. Assistant superintendent of the electric lines—you mean that you are assistant superintendent of the Southern Pacific Company's electric lines in Alameda County, California. That is correct.

73 A. Yes, sir.

Q. Have you a passenger station on your electric line in Berkeley?

A. Yes, sir.

Q. Have you an agent at that point?

A. Yes, Mr. Mitchell.

Q. Are tickets sold at that point?

A. Yes.

Q. At what point is the electric ticket office in Berkeley?

A. Well, about the corner of Shattuck and University Avenue, in the main town of Berkeley.

Q. What is the fact as to whether or not that ticket office and that station is recognized as the main Berkeley ticket and freight office by the Southern Pacific Company?

A. It is.

Q. Suppose that a passenger should buy a ticket at Berkeley destined to some point on the main line, on the steam line of the Southern Pacific, either in California or elsewhere, by what line of railroad would he leave Berkeley and where would he go?

A. It depends on where he goes.

Q. He would transfer?

A. In starting from Shattuck Avenue Station he naturally would take the electric train to Sixteenth Street if he is going to Portland or Ogden or if he is going the southern line by the way of San Jose he would go to Oakland Pier on the electric train, which runs every twenty minutes.

Q. What do you know about the freight service into the town of Berkeley? How does either a carload or less than carload of freight destined to some consignee in Berkeley reach that point?

74 A. It passes over the electric line rails between Shattuck and Ward and frequently between West Oakland yard and Ward Street, using the electric track from Sixteenth Street Station to Ward Street in both directions in either going into or going out of Berkeley.

Q. What is the amount of traffic, passenger, that travel to and from Berkeley, either coming from points on the main line in the State of California or elsewhere, or going from Berkeley to some point on the main line in the State of California or in some other state than California, is it little or large?

A. It is quite large. I have no record of the exact amount.

Q. What about passengers coming to Melrose coming from points in states other than California or main line points in California, by what lines do they reach that point?

A. By the electric trains on the Seventh Street line from Oakland Pier or from Fruitvale Station, as the case may be.

Q. Have you a ticket office in Melrose?

A. Yes, sir.

Q. Are coupon tickets sold at that office?

A. I do not think coupons are sold, but tickets to other states are sold, say to Arizona or Nevada. A coupon office is an office where they sell them to large cities like Chicago, New York, a number of coupons going over a number of different railways.

Q. But you say tickets are sold at Melrose to Nevada and other states in the Union?

A. Yes.

Q. Likewise tickets are sold from points in Nevada and other states to Melrose?

A. Yes, sir.

Q. A passenger going either to or from Melrose with such a ticket would travel over the electric line either from Oakland Pier
75 or Fruitvale?

A. Correct.

Q. What is the amount of that travel, large or small?

A. That is quite large. That territory at Melrose covers all the eastern end of Oakland and sometimes out towards Haywards and in through there.

Q. Do your electric cars carry mail, United States mail?

A. Yes, sir.

Q. Baggage?

A. Yes, sir.

Q. Express?

A. Yes, sir. The amount of mail to Berkeley is larger than any other city of its size in the United States for the reason that the college is there and the professors get big carloads.

Mr. Hurley:

Q. There are no electric locomotives used for transporting freight on these lines?

A. None whatever.

Q. The transporing of passengers from Berkeley to Oakland Mole and from Oakland Mole to Berkeley, either intra- or interstate, is more of an accommodation than a necessity, is it not?

A. In answering that question I would say we have for many years—what I mean everybody living in the town of Berkeley takes the Shattuck Avenue electric line for the reason that they can make time much quicker than by going to the station at the foot of University Avenue.

Q. It was more of a convenience than a necessity?

A. That necessity would naturally be in the judgment of the passenger himself. Now, if he wanted to be in a hurry and catch a train quick he would go to Sixteenth Street, while he could take a street car and take the train at the foot of University Ave-
76 nue, which is about a mile and a half away and catch a train.

Q. They could catch their train at the foot of University Avenue, could they not?

A. Yes the trains always stop.

Q. Do you know, Mr. Norton, whether there is a difference in the price of the ticket from Shattuck Avenue, Berkeley, to Reno, Nevada, as between University Avenue Station in Berkeley and Reno, Nevada?

A. My opinion is that there is none. I could not say, but we have a gentleman who can answer that later on.

Q. I asked the question of "necessity." I will put the question this way, if there were no station on Shattuck Avenue, Berkeley would still have railway connections by way of University Avenue?

A. On the steam line, yes, sir.

Mr. Clark:

Q. Mr. Norton, I did not ask you anything about Alameda. Have you a passenger ticket office at Alameda?

A. Yes, sir.

Q. State whether or not interstate tickets are sold at that point, that is, tickets sold to points in other states in the Union than California?

A. They are.

Q. If a passenger should buy a ticket at Alameda destined to some point on the main line either in California or in some other state in the Union, by what line of railroad would he travel from Alameda to reach the main line train?

A. By electric train from Alameda to Fruitvale if destined to San Jose. If destined to Portland or the Ogden gateway, he would travel to Oakland Pier on the electric line train, both known
77 as the "Horse Shoe."

Q. Likewise a passenger coming from some point on the main line destined to Alameda would either transfer to the electric train at Fruitvale if coming from San Jose or the south, or at Oakland Pier if coming from the Shasta route or the Ogden gateway, and travel by the Horse Shoe line to Alameda?

A. Yes, sir.

Q. Suppose a passenger is destined to Oakland coming from Los Angeles or any place east of there to New Orleans, and if he should come in to Oakland Pier on the Coast Line, by what line would he travel from Oakland Pier to Oakland?

A. On the Oakland, Seventh Street Electric. That is general. All the time they do that.

Q. Might he not also travel from Oakland Pier to Oakland on what is known as your Eighteenth Street Electric line?

A. Occasionally he does, but that is only occasionally. Generally they all take the Seventh Street line.

E. A. MITCHELL, a witness called on behalf of defendant, being first duly sworn, testified as follows:

By Referee:

Q. What is your address?

A. Berkeley, California.

Q. Are you an employee of the Southern Pacific Company?

A. Yes, sir.

Q. In what capacity?

A. Freight and passenger agent, Southern Pacific Company, Berkeley.

78 Q. How long have you held that position?

A. Since January 1, 1908.

Mr. Clark:

Q. At what point in Berkeley is your passenger office located?

A. It is located at what we call Center and Shattuck. The station is bounded on the north by University Avenue.

Q. Where is your freight station located in Berkeley?

A. It is about ten blocks south at Ward and Shattuck.

Q. What is the fact, Mr. Mitchell, as to whether you have tariffs which fix and name passenger rates from Berkeley to points in California and to point- in other states of the Union as well?

A. Yes.

Q. What is the fact whether you sell tickets at Shattuck Avenue station in Berkeley destined to points on the main line of the Southern Pacific Company in California and in other states of the Union as well and to points on other railroads than the Southern Pacific Company in states other than California?

A. Well, we sell to all points in the United States quoted by the tariff.

Q. What is the extent of the passenger travel from Berkeley to points in other states of the Union as well as points in California?

A. I haven't looked that up for several years but the last time I looked it up the total number of main line tickets, which includes local and interline or Eastern tickets, averaged twenty-two daily.

Q. By interline tickets you may mean to say——?

A. Points beyond the Southern Pacific gateways.

Q. Some of your local tickets that you speak of would include points on the line of the Southern Pacific Company in
79 Nevada, Utah, Arizona and New Mexico?

A. Yes.

Q. A passenger buying a ticket at that Shattuck Avenue Station, we will say, destined to some point in Arizona or New Mexico or New Orleans, by what line of railroad would he travel out of Berkeley?

A. He would take the electric line to Oakland Pier.

Q. And their transfer to the main line train?

A. Yes, or cross the bay and take the train at Third and Townsend.

Q. What about a passenger buying a ticket at your Shattuck Avenue Station destined to some point in Nevada or east of Ogden, on what line of railroad would he travel out of Berkeley?

A. If he traveled over our line he would take the electric line either to Sixteenth Street or Oakland Pier.

Q. What is the fact whether or not you sell tickets at Berkeley by which a passenger may take the train at University Avenue?

A. We sell tickets and sometimes the passenger- take their own convenience and take the train from University Avenue.

Q. How far is University Avenue Station from your Shattuck Avenue station, approximately?

A. Two miles.

Q. I wish you would tell us as nearly as you can what percentage of the passengers who buy tickets at Shattuck Avenue station travel over the electric line from Berkeley to Sixteenth Street or Oakland Pier?

A. Well, those purchasing tickets at the Station in my charge I

should say fully seventy per cent use the electric line wither to Oakland Pier or Sixteenth Street.

80 Q. What is the fact about passengers coming into Berkeley from points on the main line either in California or elsewhere, or from points on other lines of railroad, travel over the Southern Pacific to Oakland Pier?

A. I cannot say how many get off at Berkeley, University Avenue or now many come into Berkeley.

Q. When you sell a ticket at Shattuck Avenue destined to some point on the main line either in California or elsewhere, what kind of a coupon is placed on the ticket entitling the passenger to ride from Shattuck Avenue, Berkeley, to Oakland, Sixteenth Street, or Oakland Pier?

A. It is a local ticket——

Q. It is fastened to the ticket?

(*Q.*) Yes, the original ticket. If it is an interline ticket or eastern ticket we attachea special paster form.

Q. I hand you a coupon marked Exhibit "A" and ask you to examine it and say whether or not this coupon is like a coupon that is attached to your tickets that you call interline tickets going to some point or destined to some point on a line other than the Southern Pacific Company?

A. That is the very form which we use.

Q. What is the form number, if you can recall, that is attached to what you call your local tickets?

A. There is no form number attached it is a part, integral part of the ticket. For instance, if we had a ticket to Reno, the ticket is called Form 6, but on that is a coupon which would be attached but it is a part of the original ticket.

Q. Have you one of those forms with you?

A. I have not.

81 Mr. Clark: I aske the Referee now to introduce in evidence this Exhibit "A", which has been identified by the witness as being attached to tickets on what is known as interline tickets, or tickets to points outside of the State of California on railroads other than the Southern Pacific Company.

Exhibit mentioned is filed and marked Defendant's Exhibit "A".

Q. You have something to add?

A. I might add in our stock of tickets, sometimes the local tickets, the old form used, have not this coupon attached. In that even- we use that universal form for any ticket which had not the coupon.

Q. But on any of your new form tickets there is a separate coupon from Berkeley to Sixteenth Street or Oakland Pier?

A. Yes.

Q. What is the extent of the freight business both in and out of Berkeley?

A. At the present time there we release about three hundred cars a month. We could release more but equipment is short.

Q. And about what amount of freight business comes into Berkeley?

A. Well, it is ninety percent of the business that comes into Berkeley, of the freight business.

Referee:

Q. You mean that the incoming business is——?

A. I mean of the total volume of business is was practically
82 inbound ninety percent. I may be a little high—I will say eighty per cent.

Q. What percentage of the business that comes into Berkeley by freight originates at points in states other than California,

A. We would average about fifty "pro" a day, that is a freight bill inbound. I should judge that ten of those at least are what we call interline shipments.

Q. Or interstate shipments?

A. Yes, interstate shipments.

Q. By that you mean the freight bill upon which the amount of freight on the shipment is shown?

A. Yes and which we give to the consignee when he pays the bill.

Q. Over what line of railroad does the freight that both comes into Berkeley and out of Berkeley travel?

A. It comes on the steam line as far as Sixteenth Street and then it takes what you call the electric line, Shattuck Avenue line to Ward Street.

Q. You know nothing about the kind of a ticket that is given a passenger to travel from Sixteenth Street or from Oakland Pier to Berkeley or how he secured that ticket?

A. I know that he gets a suburban ticket from the main line conductor.

Q. That is to say, if a passenger holds a ticket destined to Berkeley the conductor takes up the entire ticket presented by the passenger and gives him a coupon entitling him to ride over the electric line?

A. Yes sir.

Mr. Hurley:

Q. Mr. Mitchell, the exhibit which Mr. Clark presented as Exhibit "A", the coupon stub, is only given between the stations named on the ticket, is it not?

83 A. Yes. It is not good on the main line.

Q. I will ask you the question in this way. If I were to buy a ticket at Shattuck Avenue Station in Berkeley destined to Ogden, one of those stubs would be put on the ticket?

A. Yes.

Q. I could take that ticket at 10 o'clock in the morning and ride to Sixteenth Street depot and get off?

A. Yes.

Q. Go up into Oakland, travel in Oakland all day, and come back to Sixteenth Street that afternoon and take the train that afternoon?

A. Yes.

Q. That ticket, that stub, itself is not a part of an overland ticket, it is a purely local ticket?

A. I consider it a part of the overland ticket.

Q. If a person walked into your station and wanted to buy a ticket to San Francisco, and you were unfortunately out of tickets you could sell him that stub of a ticket?

A. No, I could not. He would have to pay his fare on the train.

Q. The ticket given by a conductor to an incoming passenger, who is the holder of an overland ticket is not a part of the ticket, is it? It is a separate coupon entirely?

A. I understand it is a separate ticket, that is my understanding.

Q. Entitling him to a privilege which his overland ticket did not entitle him to?

A. Yes, his overland ticket entitles him to ride to Berkeley, and if he did not have this coupon or ticket he would have to pay his fare on the electric train.

Q. But that ticket entitles him to travel to Oakland Pier and back to Berkeley?

A. Yes.

84 Q. In attaching that gum stub to a ticket purchased at Shattuck Avenue, isn't there a 10¢ additional charge on that?

A. No sir, there is not.

Q. Is the fare from University Avenue Station to Reno the same as it is from Shattuck Avenue to Reno?

A. I cannot say as to that, but if I understood you right "does this stub here represent an additional charge of 10¢", it does not. The fare to all points beyond the Southern Pacific gateways are identical with University Avenue. It is just simply a matter of expediency to use that ticket.

Q. It is a matter of accommodation and not necessity?

A. It is a matter of just an arrangement they have. They carry Omen registers on all these electric cars and each man has to have that to show for every passenger.

Q. Otherwise, if he did not register, it might be possible for a passenger to come on the train and simply punch the ticket and have him proceed on his travels, but the conductor on the electric train must have some form of ticket to show that the person rode on that train?

A. Yes.

Q. There is no freight hauled into or out of Berkeley by electric train?

A. No.

Mr. Clark:

Q. This coupon marked Defendant's Exhibit "A", which has been introduced in evidence and which you say you attach to what you call local tickets, the ticket to which this is attached would show the ultimate destination on the main line?

A. Yes.

Q. And that would be shown whether that local ticket was to some point in California or to some point in some other state on the line of the Southern Pacific Company?

85 A. Yes.

Mr. Hurley:

Q. What means have you of distinguishing whether that ticket would be attached to an overland ticket or a local ticket?

A. The only means of distinguishing would be the form and number inserted in the ticket. That identifies the main line ticket to the office.

Q. A local ticket destined to Stockton would bear a different form and different number from a ticket destined to Ogden, would it?

A. Yes, for instance, a local ticket to Stockton might be Form 6 but it might be No. 18 and that No. 18 would be on this same coupon detached by the electric line.

Mr. Clark:

Q. State whether or not this Exhibit "A" sample ticket is an exact duplicate of the pasters that are used by you in your Berkeley office?

A. It is an exact duplicate.

Q. You referred to the form and number that would be placed or inserted in this coupon. By "form" and "number" you mean that you would write in at the blank space after the word "form" the form of the ticket and in the blank space after "No." indicating number, the number of the ticket?

A. That is what the ticket seller does at the time of the sale.

Q. And you do not refer to Form 576 or to the number 32302 appearing on the ticket?

A. No sir.

Q. You referred to a ticket Form 6. I understand you to say that is the form of a ticket that would be used if the passenger was destined to some point on some railroad other than the Southern Pacific Company?

A. No. That Form 6 is what we call a one point ticket.
86 For instance, if we had a sale of say 25 or 30 tickets a month to a certain one station, Fresno, Stockton, Sacramento, they furnish us with a ticket and that is Form 6. That does away with the use of the blank form.

Q. Do you have any tickets Form 6 which you sell to passengers destined to points in states other than California?

A. I think we have a one point ticket Form 6 to Reno, Nevada. I am not quite sure but I think that we have.

Referee:

Q. Are you the agent of the Southern Pacific Company at University Station?

A. No sir.

Q. Is that a separate agency from yours?

A. Yes sir.

Mr. Hurley:

Q. They maintain a regular ticket office at University Avenue station?

A. Yes.

Q. Covering all points covered by the tariff?
A. Yes.

87 F. S. HOWARD, a witness called on behalf of defendant, being first duly sworn, testified as follows:

By Referee:

Q. What is your address?
A. San Francisco, California.
Q. You are an employee of the Southern Pacific Company?
A. Yes sir.
Q. In what capacity?
Q. Assistant chief rate clerk of the passenger department.
Q. How long have you held that position, Mr. Howard?
A. Since October, 1906.

Mr. Clark:

Q. I wish you would state, Mr. Howard, whether or not you have a ticket agency in Berkeley at the Shattuck Avenue Station?
A. We have.
Q. Whether or not you have filed or the Southern Pacific Company has filed with the Interstate Commerce Commission tariffs naming and fixing rates from Berkeley to different points in the State of California as well as to different points in other states of the Union?
A. We have.
Q. Whether or not tickets are sold at the Shattuck Avenue Station pursuant to and at the rates named in the tariffs to points in the State of California as well as to other states in the Union?
A. We have such tariffs.
Q. You may state if you know, whether or not passengers purchasing tickets at Shattuck Avenue Station travel over the Southern Pacific electric lines from there to Sixteenth Street, Oakland
88 or to Oakland Pier, where they transfer to main line trains?
A. A passenger will buy a ticket at Shattuck Avenue Station, but after he has purchased the ticket that may be used from any point in Berkeley, not only on the Shattuck Avenue Line but on the California Street Line, the Ninth Street Line, or the Ellsworth Line.
Q. To what point?
A. To Oakland, Sixteenth Street or to Oakland Pier.
Q. When tickets are sold at Berkeley destined to points in states other than California as well as to local points in California, what kind of a coupon is attached to that ticket entitling the passenger to ride from Berkeley to Oakland, Sixteenth Street or to Oakland Pier to transfer to the main line train?
A. Form 576 is attached to practically all tickets, but we have tickets like Form 6, which have a coupon really printed right on, which is substantially the same as this.
Q. This form 576 which you have referred to is Defendant's Exhibit "A"?
A. Yes sir.
Q. Suppose a passenger is given this ticket Form 6, am I to understand that that is only a ticket that is used to certain given points?

A. Yes sir.

Q. What is the fact as to whether Form 6 is a ticket that is used from Berkeley to Reno, Nevada?

A. We have a Form 6 out of Shattuck Avenue, Berkeley, to Reno, Nevada.

Q. Does that Form 6 have a coupon attached to it other than this Form 576 entitling the passenger to ride from Berkeley to Sixteenth Street or Oakland Pier.

A. It has.

89 Ticket Form 6 is to be furnished the Commission and when furnished will be marked Defendant's Exhibit "B".

Q. Suppose a passenger holds a ticket which he has purchased at some point in a state other than California destined to Berkeley, what would the conductor on the main line train coming in to Oakland Pier do with the ticket he had purchased? What kind of a coupon or ticket would he furnish the passenger entitling him to ride from Sixteenth Street or from Oakland Pier to Berkeley?

A. He would be given Form 972.

Q. What would the conductor do with the ticket bought as some Eastern destination?

A. He would lift the entire part of the ticket.

Q. In other words, what you mean to say is that if a passenger had bought a ticket at Chicago destined to Berkeley, the conductor coming in to Oakland Pier would take up that entire ticket and give to the passenger this Form 972?

A. Yes sir.

Q. And on this ticket Form 972 the passenger could ride from Oakland Pier or Sixteenth Street, Oakland, to Berkeley?

A. Not only to Berkeley but to any point that he might select on the Ellsworth, Shattuck, California or Ninth Street lines.

Q. Assuming that his destination was Alameda, the proceeding would be the same. The conductor would lift the ticket, give him this stub, or Form 972, upon which the passenger could ride to his destination?

A. Yes sir.

90 I ask the Referee to mark this stub Form 972 Defendant's Exhibit "C" and ask that it be introduced in evidence.

Ticket referred to is filed and marked Defendant's Exhibit "C".

Q. I wish you would state whether or not Alameda has a passenger ticket agent?

A. It has.

Q. Whether or not tariffs have been made up and have been filed fixing and naming the rates from Alameda to points in other States of the Union, and likewise, from points in other states of the Union to Alameda?

A. They have.

Q. In traveling either from or to Alameda over what line of railroad would the passenger travel?

A. If the passenger were going from Alameda to Chicago he would get on an electric train at some point in Alameda and go by way of

Fruitvale, Seventh Street, to Oakland Pier, and he would there board the steam line train.

Q. Suppose he were going from Alameda to New Orleans, what line would he travel on from Alameda to what point to take the main line?

A. He would either follow the same route to the Pier and take the boat to San Francisco, or he would go to Fruitvale and board the main line train there.

Q. If he were traveling from Alameda to New Orleans, what kind of a coupon would be attached to the ticket entitling him to ride from Alameda to Fruitvale or to the Pier and across the Bay to San Francisco?

A. Form 576.

91 Q. A passenger coming from New Orleans or El Paso to Alameda, if he should travel by what is known as the Sunset Limited or Sunset Express, which runs over the Southern Pacific Company's lines, what kind of a coupon would be furnished him or given him entitling him to ride either from Fruitvale or from Oakland Pier to Alameda?

A. Form 972.

Q. I understand you to say that you have tariffs that have been filed with the Interstate Commerce Commission and that tickets are sold to all points in the United States from Berkeley, Alameda and Melrose?

A. Yes, sir.

Q. And it is possible for a passenger at either one of the three stations to buy a ticket to any point like Omaha, Kansas City, Chicago, Boston, New York, Philadelphia or any other point of any importance from either of those stations?

A. Yes sir.

Q. And likewise tickets can be bought at any Eastern point of importance other than California to Berkeley, Alameda or Melrose, and that such passenger either coming in to Oakland Pier or Fruitvale would be furnished with Form 972 entitling them to ride on the electric lines to either of the three points they were destined?

A. Yes, sir.

Mr. Hurley:

Q. Mr. Howard, isn't this ticket Form 972, Defendant's Exhibit "C," substantially the same ticket as you would purchase at a local ticket office for a suburban train?

A. Why, it is a ticket that is given without charge. That is entirely different.

Q. That wasn't my question. I asked if the ticket wasn't substantially the same ticket, the wording and all with the ex-

92 ception of the conductor's check, practically the same ticket that you would purchase at a suburban ticket office and for a suburban ride?

A. No, I wouldn't say so.

Q. Doesn't the suburban ticket office ticket contain the wording

"Oakland Pier to Berkeley or Alameda or from Fruitvale to West Oakland or Melrose or Alameda?"

A. We sell tickets similar in form and similar in wording.

Q. It gives the passenger practically the same privileges that this does, a ride in the suburban train? That is the only privilege this is good for, a ride on the suburban train?

A. Yes, that is all.

Q. Now, a passenger purchasing a ticket in the East for Berkeley, we will say, could, if he wanted to, get off at University Avenue Station, could he not?

A. Yes, sir.

Q. And if he passed University Avenue Station and came on to Oakland Pier the conductor would then give him this ticket to return back to Shattuck, if he desired, would he not?

A. These tickets are issued before he gets to University Avenue.

Q. Then he could go to Oakland Pier or Alameda on this?

A. Yes, sir.

Q. Or get off and come back to Oakland, Fruitvale or Melrose?

A. Yes.

Q. So the ticket itself is only a local ticket. That ticket wouldn't be good to San Leandro?

A. No.

Q. Suppose a passenger bought a ticket for Chicago and he desired to stop off one day in Omaha, one day in Ogden, one day in Council Bluffs, or any other city, would he not have to arrange for those stop-overs before leaving here?

93 A. He would buy a different class ticket, a stop-over ticket rather than a close limited ticket.

Q. He would have to buy a stop-over ticket in order to entitle him to those privileges?

A. Yes, sir.

Q. If he bought that ticket at Shattuck Avenue, Berkeley, and Form 576 was attached to the ticket, he could stop over at Sixteenth Street, Oakland, without making any mention of it, could he not?

A. Yes, sir.

Mr. Hurley:

Q. This Form 576 is purely a local ticket, is it not?

A. Yes.

Q. Entitling a passenger to a ride from Shattuck Avenue to either Sixteenth Street or Oakland Pier?

A. I don't consider it a local ticket? It is part and parcel of the through ticket.

Q. Such being the case, why is it then that a man can stop over at Sixteenth Street all day long without having the same stop-over privilege in that Form 576 that he has to purchase in his through stop-over ticket?

A. I do not understand.

Q. You say you consider it a part and parcel of a through ticket; a man has a privilege with that ticket that he hasn't with a through

ticket, he would stop over at Sixteenth Street all day long and go into Oakland and come back in the evening and catch the evening train out of there?

A. Your previous question about stop-overs involves stop-overs at several points of twenty-four hour duration.

Q. Yes, this is of twelve hour duration?

A. A twelve hour stop-over is not considered a stop-over that makes any difference in the limit of the ticket.

94 Q. You mean to say I can buy a ticket to Oakland and go East and drop off any point for twelve hours without saying anything about it?

A. No, you can't.

Referee:

Q. Mr. Howard, is it not a fact that Oakland, Sixteenth Street, or Oakland Pier is the equivalent to a junction point where passengers may stop over on their tickets if they take the train to their destination within the limit of time specified upon their ticket?

A. Yes, sir.

Mr. Hurley:

Q. Is it not a fact that a passenger at a junction is supposed to take the next train out of that junction carrying him to the point where he wants to go?

A. No, it is not.

Q. Is it not a fact that Form 576 can be used in lieu of any other form on a ticket going no further than Tracy?

A. Yes.

Q. That then would make it a local ticket?

A. Yes, sir.

Mr. Clark:

Q. Your tariffs fixing your rates from Berkeley to any other point named a certain sum that is the price of that ticket?

A. Yes, sir.

Q. And that price includes this coupon Form 576, ride from Berkeley to Oakland Pier or Oakland, Sixteenth Street?

A. Yes, sir.

Q. And likewise tickets destined to Berkeley are sold for a certain price fixed by the tariff, which includes this Form 972, Oakland Pier or Oakland, Sixteenth Street, to Berkeley?

95 A. Yes.

Q. Or to any of the points named on the ticket?

A. Yes, sir.

J. C. BOWLES, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Referee:

Q. What is your address?
A. Oakland Pier, California.
Q. Are you an employee of the Southern Pacific Company?
A. Yes, sir.
Q. In what capacity?
A. I am head clerk of the trans-bay conductor's bureau.
Q. How long have you held that position, Mr. Bowles?
A. Five years.

Mr. Clark:

Q. As chief clerk of that bureau, state whether or not the conductors come into your office and you check the numbers of Form 576 which are taken in each day on the different electric lines?
A. Not that particular form, not that particular form of ticket.
Q. What forms do you check?
A. All main line tickets, all the tickets that are sold by agents on the electric lines to points reading beyond the electric lines.
Q. Isn't that Form 576 used on the electric lines issued to read, for instance, from Berkeley to Sixteenth Street?
A. Yes.

96 Q. Whether or not you are able to state how many checks of Form 972 were collected by the different electric lines during the month of June, 1917?

A. Yes.
Q. How many tickets of that form were collected on the Seventh Street line during the month of June, 1917?
A. 72—156.
Q. How many on the Horse Shoe line during the same period?
A. 119.
Q. On the Shattuck Avenue line?
A. 194.
Q. Ellsworth?
A. 88.
Q. California, Ninth Street?
A. 87.
Q. Eighteenth Street?
A. 10.
Q. Fourteenth Street?
A. 10.
Q. Alameda Loop?
A. 17.
Q. I wish you would state how many coupons were collected during the month of June, 1917, that you attached to main line tickets from Berkeley, Alameda, Melrose?
A. Seventh Street, 435; Horse Shoe line, 263; Shattuck Avenue, 1044; Ellsworth line, 306; California, Ninth Street Line, 247; Eighteenth Street, 104; Fourteenth Street, 18; Alameda Loop, 143. That is all.

Mr. Hurley:

Q. Mr. Bowles, how many of those tickets, speaking of main line tickets, were going tickets or tickets destined to points outside of California, do you know?

A. No.

97 Q. So far as you know, they may have all been local tickets in California?

A. I know there were not because I saw some of them, and some of them read beyond, some Ogden, Council Bluffs, Chicago.

Q. How would you know that they were interstate tickets?

A. On the 576 Form, which is attached to an interline ticket, the form number bears four figures, whereas to a local point it has three figures in the form.

Q. So that is the way you have to distinguish?

A. By looking at a glance I can tell whether it is an interline ticket or a local ticket.

Q. You say they were destined to Council Bluffs or Chicago. Could you tell by the number what the destination was?

A. No.

Q. So the words "Chicago" or "Council Bluffs" were just——?

A. Any point on a foreign road, any foreign line, the four figures are used in the form, whereas in a local form, a ticket, say, to Portland, the form would bear three numbers.

Q. All tickets controlled on roads controlled by the Southern Pacific bear three numbers?

A. I do not know.

Q. A foreign ticket bears four numbers?

A. I do not know. I haven't seen all the tickets.

Mr. Clark:

Q. The form number you refer to, where the four numbers are referred to, the four numbers you refer to are inserted in the blank space after the word "Form"?

A. Yes, it gives the form number and number of the ticket to which it is attached.

Q. And tickets with four numbers are to points outside of California?

98 A. Yes, that is the way I understand it.

J. JOHANSEN, a witness called on behalf of defendant, being first duly sworn, testified as follows:

By Referee:

Q. What is your address?

A. Fruitvale, California.

Q. You are an employee of the Southern Pacific Company?

A. Yes sir.

Q. In what capacity?

A. Chief operator of electric power.

Q. Where are you stationed, Mr. Johansen?
A. I am stationed in Fruitvale power station and sub-stations West Oakland and Berkeley.
Q. How long have you held that position with the company?
A. Since the inauguration of the electric system in 1911, May, 1911.

Mr. Clark:

Q. Where is all of your electric power originally manufactured?
A. In the Fruitvale power station.
Q. State whether or not all of the power or electricity that is manufactured in the Fruitvale power station is transmitted by two main lines from the Fruitvale power station to the West Oakland sub-station and the Berkeley sub-station?
A. It is transmitted by three.
Q. That power that is transmitted over the three main lines from Fruitvale station to West Oakland sub-station and to Berkeley sub-station is the electricity which is reduced and carried into the trolley wires for the movement of all the electric cars of the Southern
99 Pacific in Alameda County?
A. Yes.

Ten, fifteen and eight days given for the filing of briefs. Case then to be submitted.

L. C. PEDROTTA.

Industrial Accident Commission, State of California. Filed Sep. 28, 1917. By H. L. White. L. J.

100 [Endorsed:] No. 4510. Before the Industrial Accident Commission of the State of California. In the matter of the application of Mrs. Mary E. Butler et al., applicant, vs. Southern Pacific Company, Defendant. Testimony. 407 Underwood Building, San Francisco, California.

101 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. Mary E. Butler and Albert Nelson Butler, a Minor, by Mrs. Mary E. Butler, His Guardian ad Litem, Applicants,

vs.

Southern Pacific Company, a Corporation, Defendant.

Petition for Rehearing.

Comes now defendant, Southern Pacific Company, and pursuant to the provisions of the Workmen's Compensation, Insurance and Safety Act of the State of California, Chapter 176, Laws of 1916,

as amended by Chapters 541, 607 and 662, of the Laws of 1915, effective August 8, 1915, and petitions the Commission to set aside and hold for naught the award of the Commission in favor of said applicants and against said defendant, dated September 20, 1917, in the above entitled application wherein the applicants were granted an award of Four Thousand, Five Hundred Seventeen and 52/100 Dollars ($4517.52), for a fatal injury received by William T. Butler at Oakland, California, on the 21st day of June, 1917, while employed by defendant as an electric lineman.

The following papers and pleadings, on file with the Commission in the above entitled application, are hereby referred to:

1. The formal application, signed by the applicants.
2. The answer of defendant.
3. The transcript of testimony taken at the hearing of this application at Oakland, on the 27th day of July, 1917.
4. The Findings of Fact and Award made by the Commission on the 20th day of September, 1917.

102 This petition for rehearing is based upon the ground that the Industrial Accident Commission had no jurisdiction to grant an award in said application against said defendant for the following reasons:

1. The facts found by the Commission in its third finding of fact show upon their face, as a matter of law, that the defendant, in the operation of its system of electric cars in Alameda County, California, was engaged in interstate commerce, and that the deceased, William T. Butler, at the time he received the injury resulting in his death, while employed by defendant, was engaged in interstate commerce, or in an act which was so directly and immediately connected with interstate business as substantially to form a part and a necessary incident thereof, and notwithstanding the conclusion of the Commission in the third finding of fact, "he (William T. Butler) was employed in work preliminary to the running of said electric cars and that therefore, he was not employed in interstate commerce", the undisputed evidence as well as said finding of fact shows, as a matter of law, that the deceased was engaged in interstate commerce at the time he received his fatal injury and therefore this Commission had no jurisdiction.

2. From the facts found in the third finding of fact, the Commission concludes "that while said employee was working as aforesaid, between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric cars and he (William T. Butler) was employed in work preliminary to the running of said electric cars, and that, therefore, he was not employed in interstate commerce". It is the claim of the defendant, and the evidence shows without dispute, that at the time the deceased met his fatal injury that he was engaged in an act which was so directly and immediately connected

103 with interstate business as substantially to form a part and a necessary incident thereof, and that, therefore, any cause of action that existed in favor of his dependents or beneficiaries is governed by the Federal Employer's Liability Act.

3. The defendant herein claims a right, privilege and immunity arising under the constitution and laws of the United States as to said award and the enforcement thereof, upon the ground that at the time of the accident which resulted in the death of William T. Butler, said Southern Pacific Company was a common carrier by railroad, actually engaged in commerce between several states of the union, and that in connection with its system of steam railroad it operated a system of electric railroad in Alameda County, California, and that in the operation of said electric system of railroad it was engaged in interstate commerce, and that said William T. Butler, at the time of the accident which resulted in his death, was actually employed by said carrier in said interstate commerce, and that, therefore, the liability of said defendent to the personal representatives of said William T. Butler for the benefit of the surviving widow, or to said widow, and said minor child, Albert Nelson Butler, is to be measured solely and exclusively by the provision of the Act of Congress of April 22, 1908. Public No. 100, entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases" and the acts amendatory thereof or supplemental thereto.

The closing sentence in the third finding of fact, that the deceased, at the time he met his injury, was not engaged in interstate commerce, is but the conclusion of the Commission based on the facts found to be true in said finding. We insist that this conclusion is erroneous and that, as a matter of law, the facts found by the Commission, on their face, show that the deceased was engaged in interstate commerce, and in an act which was so directly and immediately connected with interstate business as substan-
104 tially to form a part and a necessary incident thereof, at the time he met his fatal injury, and that, therefore, the award should be set aside and held for naught, a rehearing granted, and on final conclusion, an award granted in favor of the defendant.

The Commission found that the defendant, in the operation of its system of electric railroad in Alameda County, was engaged in interstate commerce. The Commission also found the place at which the electricity for the operation of said cars is generated and the manner in which the electricity or energy is transmitted from the power house, where generated, to reducing stations at West Oakland and Berkeley, and the character of work the deceased was performing at the time he received his fatal injury. The defendant claims that the evidence shows, without dispute, that at the time of the accident in question, the deceased was engaged in interstate commerce, or in an act which was so directly and immediately connected with interstate business as substantially to form a part and a necessary incident thereof. At the hearing of this application it was stipulated and agreed between the applicants and defendant as follows:

"13. That at the time the deceased met his death that the Southern Pacific maintained what is known as a mainpower house at or near Fruitvale, Alameda County, California; that at this power

house the electricity used by the Southern Pacific Company in the operation of its electric cars in Alameda County is manufactured and from said power house transmitted by main lines to its West Oakland substation and to its Berkeley substation, at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the Southern Pacific Company on its different electric lines in Alameda County, California;
105 that the said deceased at the time he received his injury which produced his death was working on one of the main lines by which the electricity is transmitted from Fruitvale to West Oakland and Berkeley sub-stations and was doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted."

J. JOHANSEN, a witness on behalf of the defendant, testified:

"Q. What is your address?
A. Fruitvale, California.
Q. You are an employee of the Southern Pacific Company?
A. Yes sir.
Q. In what capacity?
A. Chief operator of electric power.
Q. Where are you stationed, Mr. Johansen?
A. I am stationed in Fruitvale power station and substation West Oakland and Berkeley.
Q. How long have you held that position with the company?
A. Since the inauguration of the electric system in 1911, May, 1911.

Mr. Clark:

Q. Where is all of your electric power originally manufactured?
A. In the Fruitvale power station.
Q. State whether or not all of the power or electricity that is manufactured in the Fruitvale power station is transmitted by two main lines from the Fruitvale power station to the West Oakland sub-station and the Berkeley sub-station?
A. It is transmitted by three.
106 Q. That power that is transmitted over the three main lines from Fruitvale station to West Oakland sub-station and to Berkeley sub-station is the electricity which is reduced and carried into the trolley wires for the movement of all the electric cars of the Southern Pacific in Alameda County?
A. Yes."

The stipulation between the applicants and defendant, at page 4 of the transcript of testimony, shows the different electric lines operated by defendant in Alameda County and the points between which they are operated, that one of said electric lines of railroad is operated from Oakland Pier to Alameda via Seventh Street and Fruitvale and known as the Horseshoe Line.

Relative to the operation of electric trains engaged in interstate

commerce through Fruitvale, Mr. Gaylord, Assistant Superintendent, testified that there was a freight and passenger station maintained at Fruitvale. (Trans. p. 10.) Passengers boarding the electric trains at Melrose, traveling to points either in California or other states in the union, would travel by the electric railroad from Melrose either to Fruitvale, or through Fruitvale, to Oakland Pier, where the main line trains would be taken. Likewise, passengers destined to Melrose would either board the main line train at Oakland Pier, passing through Fruitvale, or board the train at Fruitvale. (W. H. Norton, Trans. pp. 18, 19.)

F. S. HOWARD testified as follows (Trans. p. 34):

"Q. In traveling either from or to Alameda, over what line of railroad would the passenger travel?

A. If the passenger were going from Alameda to Chicago, he would get on an electric train at some point in Alameda and go by way of Fruitvale, Seventh Street, to Oakland Pier, and he
107 would there board the steam line train.

Q. Suppose he were going from Alameda to New Orleans, what line would he travel on from Alameda to what point to take the main line?

A. He would either follow the same route to the Pier and take the boat to San Francisco, or he would go to Fruitvale and board the main line train there.

(P. 35) "Q. And likewise tickets can be bought at any Eastern point of importance other than California to Berkeley, Alameda or Melrose, and that such passenger either coming in to Oakland Pier or Fruitvale would be furnished with Form 972 entitling them to ride on the electric lines to either of the three points they were distined.

A. Yes sir."

From the stipulations and testimony referred to, it will be seen that all of the electricity used in furnishing the power for the operation of defendant's electric lines in Alameda County is generated at the main power station, at the incorporated city of Fruitvale; from that point it is transmitted to the West Oakland and Berkeley substations, where the energy is reduced before transmitting it direct to the trolley wires. These lines for the transmission of the electricity from Fruitvale must necessarily be kept in a workable and usable condition. It was between Fruitvale and West Oakland, upon the main line by which the electricity is transmitted, that Butler met with his accident. The electricity, which was then being transmitted over the main line, was then on its way to the West Oakland and Berkeley reducing stations. If the main line should become out of repair or short-circuited so that the electricity could not be transmitted to the said reducing stations, it would follow that the entire electric
108 system of defendant in Alameda County, which, it has been found, was engaged in interstate commerce, would be at a standstill. It therefore seems that the work in which the deceased

was engaged, in keeping this main line in a workable and usable condition was an act which was so directly and immediately connected with interstate business as substantially to form a part and a necessary incident thereof.

Wherefore, defendant prays that the award of the Commission in favor of the applica-ts and against defendant, dated September 20, 1917, for Four Thousand Five Hundred Seventeen and 52/100 Dollars ($4,517.52) be set aside and held for naught, and that a rehearing be granted and upon such rehearing such further order, or orders, be made by the Commission as may be consonant with the provisions of said Workmen's Compensation Act, as supported by the evidence presented.

HENLEY C. BOOTH,
A. L. CLARK,
Attorneys for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

T. O. Edwards, being first duly sworn, deposes and says:
I am assistant secretary of the defendant, Southern Pacific Company, above named, and the facts stated in the foregoing Petition for Rehearing are true, except as to such facts as are therein stated on information and belief, which I believe to be true.

[SEAL.] T. O. EDWARDS.

Subscribed and sworn to before me this 9th day of October, 1917.

MARGUERITE S. BRUNER,
Notary Public in and for the said City and County of San Francisco, State of California.

Industrial Accident Commission, State of California. Filed Oct. 9, 1917. By H. L. White, C. J.

109 SOUTHERN PACIFIC COMPANY, October 8, 1917.

Mrs. MARY E. BUTLER et al.

vs.

S. P. Co.

Industrial Accident Commission, 525 Market Street, San Francisco, Cal.

GENTLEMEN: Herewith I send you Petition for Rehearing in the above entitled application.

A copy of the Petition for Rehearing, together with a copy of this letter, has been mailed to the applicant, at 708 29th St., Oakland, the address shown in the application.

A copy of the Petition for rehearing has also been mailed to E. F. Durrell, 387 12th St., Oakland, who represent- the applicants.

Yours very truly,

WM. F. HERRIN.
M.

A. L. C.
H. L. C.

Inc.

Industrial Accident Commission, State of California. Filed Oct. 9, 1917. By H. L. White, L. J.

110 Before the Industrial Accident Commission of the State of California.

Claim No. 4510.

Mrs. MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mrs. MARY E. BUTLER, His Guardian ad Litem, Applicant,

vs.

SOUTHERN PACIFIC COMPANY, Defendants.

Order Denying Petition for Rehearing.

A petition for rehearing having been filed on behalf of the defendants, Southern Pacific Company, claiming that this Commission erred in holding that the injury and death which forms the basis of this procedure were governed by the California Workmen's Compensation Insurance and Safety Act instead of by the Federal Employers' Liability Act, and

It appearing that said issue of jurisdiction is the only issue raised by said petition, and that the facts as stated by said petition are substantially as found by this Commission and that the argument therein presented is insufficient to convince this Commission that its conclusion upon said facts is erroneous,

It is hereby ordered that said petition for rehearing be and the same hereby is denied.

Witness:

[SEAL.] INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA.
A. J. PILLSBURY,
WILL J. FRENCH,
Commissioners.

Dated at San Francisco, California, this 8th day of November, 1917.

Attest:

H. L. WHITE,
Secretary.

Industrial Accident Commission, State of California. Filed Nov. 8, 1917. By H. L. White, G. W.

111 S. F. No. 8583. In Bank, March 25, 1918.

SOUTHERN PACIFIC COMPANY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

Petition for Writ of Review Prayed for Against the Industrial Accident Commission of the State of California.

The Industrial Accident Commission made an award in favor of the dependents of William T. Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda county, its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substation the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars.

When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations.

This writ of review was issued to test the validity of the employer's claim that the commission was without jurisdiction to make an award, for the reason that Butler was engaged in interstate commerce, within the purview of the act of Congress of April 22, 1908. In its findings the commission, after setting forth in some detail the circumstances surrounding the employee's injury, declares "that while said employee was working as aforesaid between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric
112 cars, and he was employed in work preliminary to the running of said electric cars, and that, therefore, he was not employed in interstate commerce".

Upon the question whether a given employment falls within the scope of the federal act we must look to the decisions of the courts of the United States as of controlling force. In Shanks v. Del., L. & W. R. R. Co. (239 U. S. 556), the court said: "The true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" The commission was, no doubt, seeking to apply this test, and we take it that the word "preliminary", though perhaps not an altogether appropriate term, was used by it in its finding to express the idea that the work in which Butler was engaged was not so closely related to interstate transportation as to be a part of it.

The opinion in the Shanks case refers to a number of earlier cases in which, upon varying facts, the federal statute had been held to be

applicable or inapplicable. Upon examination of these decisions, it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation. In this court it has been held that a mechanic engaged in repairing a switch engine which was used in the transportation of commerce, interstate and intrastate, was engaged in interstate commerce within the meaning of the act (Southern Pac. Co. v. Pillsbury, 170 Cal. 782); that a watchman on a main steam line was engaged in interstate commerce (Southern Pac. Co. v. Industrial Acc. Com., 174 Cal. 8); as was a lineman who was removing a telephone wire which had fallen on the trolley wire of the same lines involved in this proceeding. (Southern Pac. Co. v. Industrial Acc. Com., 174 Cal. 19.)

113 In C. B. & Q. R. R. Co. v. Harrington (241 U. S. 177), the Supreme Court of the United States had occasion to consider a state of facts more closely analogous to the situation here presented. The injured employee was a member of a switching crew which was engaged in switching cars of coal belonging to the railroad company. The coal was being switched to a shed, where it was to be placed in bins and chutes and supplied as needed to locomotives engaged in interstate as well as intrastate transportation. It was held that the Federal Employers' Liability Act was not applicable. Applying the test laid down in the Shanks case, the court said that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use". (1) The reasoning is apt here. The coal was essential to the production of motive power for the locomotives, just as, in this case, the electric current was necessary to move petitioner's cars. But in moving the coal to the shed, Harrington was engaged in a work which was at least one step removed from the actual furnishing of the coal to the engines, and this precluded that close relation of his work to interstate commerce which would bring him within the scope of the federal act. So, in this case, Butler was working on the part of the line between the main power house and a substation. The current was still to pass through the transformers and converters, and be so converted and reduced as to be suitable for use in propelling the cars. The test of remoteness seems as applicable in the one case as in the other. It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current

114 at any point, however remote from the lines of track, would immediately stop the progress of all cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says, "the federal act speaks of interstate commerce in a practical sense suited to the occasion". (Shanks v. Del., Lack.

& West. R. R., supra; C. B. & Q. R. R. v. Harrington, supra.) Viewing the question before us in this light, we think the answer to it should be the same as that given in the Harrington case. The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting on to the trolley line the necessary power to be used by the operatives of the road as desired—or, to paraphrase the language already quoted from the Harrington case, "putting the electric power (coal supply) in a convenient place from which it could be taken as required for use."

We think, therefore, that the commission was justified in exercising jurisdiction.

The award is affirmed.

SLOSS, *J.*

We concur:

ANGELLOTTI, *C. J.*
VICTOR E. SHAW, *J. pro tem.*
RICHARDS, *J. pro tem.*

115 *Dissenting Opinion.*

I dissent.

The test is stated by the Supreme Court of the United States to be "was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it"? The deceased was engaged in working upon an insulator that supported a wire that was actually in use in moving trains engaged in interstate commerce, and was killed by a fall resulting from a shock caused by an escape of some of the electric current so used. His connection with the actual movements of trains was so direct that had all the current short-circuited through his body its effect on the trains in motion would have been instantaneous.

The electricity in question was generated at a steam generating plant at Fruitvale. That steam plant was just as truly operating the moving cars, as though the steam had been generated in a locomotive attached to the train. The electric transmission line was merely a means of conducting that power to the train and in no sense differs in legal contemplation from the system of transmission of power by cable to the cars of a cable railroad. It is merely a means to an end; an instrumentality for moving inter-

state commerce; a method of applying the potential energy of coal and fuel oil to the movement of a train. The instant the potential energy was converted into kinetic energy it became the proximate cause of train movement, and the instrumentalities used in applying it to the interstate commerce is as much a part of the system of transportation as the car in which the passenger or freight rides. The intimate connection with the actual movement of trains is shown by the fact that the instant the power plant ceases to operate, or the transmission wire breaks, the car upon the railroad track, whether it be ten miles or five hundred miles away, immediately stops. The fact that in transmitting this power, it passes through what is known as transforming stations had no significance whatever. It
116 must be conceded that distance is not a factor in the determination of the question whether or not a person is engaged in interstate commerce. For instance, no one would doubt that if a train despatcher on Eiffel Tower, Paris, operated trains on an interstate railroad in California from there, he would be engaged in interstate commerce. The question of the method of the transmission of his orders would likewise be immaterial. He might use wireless across the Atlantic ocean, a telegraph wire from New York to San Francisco, and a telephone from San Francisco to the station agent, who writes the message and hands it to the conductor. It would make no difference if the message was originally written and transmitted in French and was afterwards translated into English. It is obvious that the true question is, "Were the messages that were sent by the train despatcher obeyed by the train crews in operating their trains?" So the question here is, "Was the power passing along the power line the proximate cause of the motion of the trains?" If so, those engaged in operating and maintaining the devices by which the power is transmitted would, upon the principle above stated, be engaged in interstate commerce. That this power so transmitted was the proximate cause of the movement of the trains would seem to be conclusively answered in the affirmative by the fact that any break in the power line instantaneously affects the moving trains. The transforming stations referred to in the majority opinion are merely a means to an end, viz., the transmission of the power from the steam plant to the train. The fireman in the generating plant is as truly engaged in moving interstate commerce as is the foreman of a locomotive hauling such commerce. In each case the fireman is putting into the firebox potential energy in the form of coal or oil. That energy before it is applied to the cars must first be converted into heat, a form of kinetic energy, and then from heat into train motion.
117 The fact is that both are actually engaged in moving the train by the process of converting the potential energy stored in coal or oil into the movement of a train. If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy, and then used out of the storage batteries, as in the case of an electric automobile, the situation might

be analogous to that referred to in C. B. & Q. R. R. v. Harrington, 241 U. S., 177, but under the agreed facts there is no storage whatever. This case cannot be distinguished in principle from the case of Southern Pacific Co. v. Industrial Accident Com., 174 Cal. 8, where a lineman was killed while engaged in removing a telephone wire which had fallen on a "trolley wire of the same line involved in this proceeding". The power transmission line was but an extension of the trolley wire, as much a part of the system as feed wires along the track, or the span wires supporting the trolley wires.

WILBUR, *J.*

I concur:

MELVIN, *J.*

118 In the Supreme Court of the State of California.

S. F. No. 8583.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Petition for Rehearing.

Henley C. Booth, A. L. Clark, Attorneys for Petitioner.

Filed this 13th day of April, 1918. B. Grant Taylor, Clerk. By Erb, Deputy.

119 In the Supreme Court of the State of California.

S. F. No. 8583.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Petition for Rehearing.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of California:

The petitioner above named respectfully petitions this Court to grant a rehearing in the above entitled proceeding, the opinion in

which was filed on March 25, 1918, the Court dividing on
120 the question of whether the award of the Commission should be annulled, and the majority of the Court affirming the award.

The majority and minority opinions show that the difference in opinion was not due to any disagreement as to the facts. Those facts are referred to in the opinions and are further shown by the findings of the Industrial Accident Commission printed on Pages 6 and 7 of the petition and by the stipulation of facts printed on Pages 9, 10 and 11 of the petition.

It appears clearly that the decedent was employed by a railroad carrier engaged at that time in interstate commerce. That at the time he was killed, he "was doing work that was necessary" to keep the electric line on which he was working "in a workable and usable condition" (Commission's finding, Petition, p. 7). That the point where he was working was between the power house where the electricity was generated and the reducing or transforming station through which the electricity passed on an uninterrupted journey from the power house toward the car motors of cars which were "used at the time of said injury for both interstate and intrastate commerce." (Commission's finding, Petition, p. 8.)

121 The divergence of opinion between the majority and the minority of this Court rests, according to the majority opinion, solely upon the authority of C. B. & Q. R. R. Co. vs. Harrington, 241 U. S. 177. In that case, Harrington was engaged "in switching coal belonging to defendant and which had been standing on a storage track for some time, to the coal shed where it was to be placed in bins or chutes and supplied, as needed, to locomotives"—it being conceded by the Court, for the sake of the argument, that the coal so placed was to be used by locomotives in interstate hauls—if ever used at all. In other words, in the Harrington case there was a storage of a commodity which, if ever used, would be used in interstate commerce for the purpose of generating steam by the combustion of such coal under the boilers of locomotives employed in such commerce, and upon those facts it was held by the Supreme Court that "there was no such close or direct relation in interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use." The Harrington case is solely and entirely one of storage of fuel against future needs. It is not, as is this case, one of continuous and uninterrupted transmission of the very electrical energy—a kinetic, a moving energy—which entered the car motors and was then entering the car motors and being transformed into mechanical power.

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It may be differentiated, as said by Mr. Justice Wilbur, in the dissenting opinion in the case at bar, by the observation that "if there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and

thus reconverted into potential energy and then used out of the storage batteries as in the case of an electric automobile, the situation might be analagous to" the Harrington case, "but under the agreed facts, there is no storage whatever."

The instant case is closely analagous to the illustrations given in our brief, such as a coal chute leading from a bin to the tender of a locomotive where the coal on its journey toward the tender passes through an automatic breaker which reduces it to a size sufficient for the firebox, or to the case of a water pipe leading from a water tank to the tender of a locomotive, where, midway between the
123 tank and tender, there is an apparatus automatically changeing the chemical constituents of the water so as to prevent boiler scale in the boiler of the locomotive—a not unusual treatment of water intended for locomotives.

In neither case referred to do we think it could be said that the coal chute or the pipe was not an instrumentality of interstate commerce, and in neither case, we respectfully submit, would it make any difference whether a man engaged in the keeping of such coal chute or such pipe in a usable condition for transmission of coal or water would be held to be within or without the provisions of the Federal Employers' Liability Act according to whether he was between the breaker and the tender in the one case, or the chemical apparatus and the tender in the other case. Nor would it matter in those cases what length the coal chute or the water pipe might be, provided there was continuous transmission through them from the place of storage to the locomotive. In both cases that which was necessary to the operation of the interstate locomotive would have already left its storage place, whereas, in the Harrington case, the commodity was on its way to a storage place.

In the case at bar there was no interruption in the electri-
124 cal energy from the time it left the power house until it entered the car motors. That it passed through a transforming or reduction station would not disturb the continuity of its flow, or the necessity of such continuity for the operation of the car motors toward which it was proceeding with the speed of light, or change it to storage.

We respectfully take issue with the statement in the majority opinion that "the main line is not part and parcel of the railroad or its equipment in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives." It is true that the main power line in the case at bar is not "part and parcel of the railroad," speaking of a railroad only as a right of way and cars running thereon, but it is part of the equipment of the railroad and part of an operating unit, just as much as the trolley line, because, without it, the trolley wire or line

could not become energized and without that energy con-
125 stantly present the motors would not function. If the argument of the majority is carried to its logical conclusion, then in a case like this the trolley line is not a part of the railroad or its equipment, because it is merely "an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied." We respectfully submit that an operating unit cannot be so dislocated or dissected.

Moreover, the case at bar differs essentially from the Harrington case, in that it is conceded by the record and by the majority opinion of this Court that if the current passing through the line on which Butler was working at the time of the fatal accident had been so short circuited as to cease its onward journey from the point where it was short circuited, the cars would have stopped. Not so in the Harrington case in respect to the coal being switched by him to the bins or chutes where it was stored against a future use—which might never be made.

It is conceded by the finding of the Commission (Petition, p. 7) that Butler's work "was necessary to keep said main electric lines in a workable and usable condition," the obvious conclusion being that, if such lines were not kept in a workable and usable
126 condition, the furnishing of the electricity necessary to the operation of the car motors would be materially interfered with, if not stopped, thereby manifestly interfering with the interstate commerce which, as found by the Commission, was then and there being carried on by those cars.

Nor is the case at bar analagous to the Shanks case (239 U. S. 556), wherein one engaged in putting up a shafting which was to carry a belt, which in turn would impart power to a machine, which in turn would be used in making repair parts for instrumentalities of interstate commerce was held to be too remote from the interstate commerce then being carried on. In the case at bar, Butler was as closely connected with the interstate commerce then being carried on as he would have been if he had been working in the transforming station, or on the wire between the transforming station and the trolley wire, or on the trolley wire itself, and in the latter case it was held by this Court in Southern Pacific Company vs. Industrial Accident Commission, 174 Cal. 19, cited with approval in the majority and minority opinions in this case, that a lineman so engaged on a trolley wire was employed in the commerce then being carried on on the very electric line here considered.

127 Again, we must respectfully dissent from the concluding language of the majority opinion which paraphrases an expression in the Harrington case by saying that Butler was only engaged in "putting the electric power (coal supply) in a convenient place from which it could be taken as required for use."

We respectfully suggest that the majority opinion fails to differentiate between the storage of fuel or potential energy and the direct transmission of kinetic energy in an uninterrupted journey from the place where it is generated to the place where it is changed from electrical energy to mechanical energy, namely, the car motor.

In conclusion, it is respectfully submitted that inasmuch as the electric line on which decedent was working was, then and there, an instrumentality of interstate commerce, he was "keeping in usable condition" such instrument, (Shanks case, 239 U. S. 556), and was engaged in keeping such instrumentality "in a proper state of repair while used in interstate commerce, which service is so closely related to said commerce as to be, in practice and in legal contemplation, a part of it." (Pedersen case, 229 U. S. 146.)

128 It is, therefore, respectfully submitted that as there is no legitimate ground here for invoking the doctrine of the "remoteness" cases, such as the Shanks case, or the "storage" cases, such as the Harrington case, a rehearing should be granted and thereupon this case, which is important not only intrinsically but as a precedent, should be again reviewed by this Court.

Respectfully submitted,

HENLEY C. BOOTH,
A. L. CLARK,
Attorneys for Petitioner.

Dated, April 11, 1918.

129 Due service of a copy of the within brief is hereby admitted this 13th day of April, 1918.

CHRISTOPHER M. BRADLEY,
Attorneys for Respondents,
By W. H. PILLSBURY.

130 In the Supreme Court of the State of California, in Bank.

S. F. 8583.

S. P. Co.

v.

IND. ACC. COM. et al.

By the COURT:

Rehearing denied, April 24, 1918.

ANGELLOTTI, *C. J.*

Filed April 24, 1918. B. Grant Taylor, Clerk. By Erb, Deputy.

131 *Copy of Docket Entries in Case No. S. F. 8583, Supreme Court, Southern Pacific Company v. Industrial Acc. Com.*

1917.			
Nov. 30.	Filed petition for writ of review.	21 S. F.	D. H.
" 30.	Filed petitioner's P and A	21	
Dec. 3.	Ordered that writ issue, returnable Monday, Jan. 7, 1917.		

Dec. 4. Writ issued.
Dec. 8. Writ returned with service.
1918.
Jan. 7. Filed return to writ of review.
Jan. 7. Matter called. Petr. 30, resp. 30, petr. 15, then submit.
Jan. 18. Filed stip. and order that petrs. brief filed with petition for writ of review may be taken as petitioner's opening brief, respondent 30 days to answer after filing, and approval of this stipulation. 3/16/18.
Feb. 19. Filed respondent's brief 21 S. F.
Mch. 5. Filed petitioner's reply brief 21 S. F.
Mch. 6. Ordered submitted as of this date.
Mch. 25. Award affirmed. — Sloss, J.
We concur: Angellotti, C. J.
Victor E. Shaw, J. pro tem.
Richards, J. pro tem.
I dissent: Wilbur, J.
I concur: Melvin, J.
April 13. Filed petition for rehearing 21 S. F. D. H.
April 24. Rehearing denied.
April 29. Remittitur to Ind. Acc. Com.

132 I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed, consisting of the following papers, to wit:

1. Petition for writ of review;
2. Order granting writ;
3. Writ and return of service thereof;
4. Commission's return to the writ;
5. Opinion of the Supreme Court;
6. Petition for rehearing;
7. Order denying rehearing;
8. Copy of docket entries in said case;

constitute the entire transcript of record of case numbered S. F. 8583, entitled Southern Pacific Company, petitioner, vs. Industrial Accident Commission et al., respondents, lately pending in this court, which transcript of record includes all proceedings in this court.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk,
By W. R. MARKRILLE,
Chief Deputy.

Dated May 15, 1918, at San Francisco.

In the Supreme Court of the United States, October Term, 1918.

No. 458.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Return to Writ of Certiorari.

To the Honorable the Supreme Court of the United States of America and to Honorable Edward D. White, Chief Justice of the United States:

The Chief Justice of the Supreme Court of the State of California and the Associate Justices of said Court to whom there is addressed a Writ of Certiorari issued out of the Supreme Court of the United States in the cause entitled as above and dated on the 15th day of June, 1918, hereby respectfully make return to said writ as follows:

All of the records and proceedings before said Supreme Court of the State of California in the cause numbered San Francisco No. 8583 and entitled Southern Pacific Company, petitioner, vs. Industrial Accident Commission of the State of California and Mary E. Butler and Albert Nelson Butler by Mary E. Butler his guardian ad litem, respondents, are fully shown and set forth in a certified transcript of record filed with the Clerk of said Supreme Court of the United States by said plaintiff in error on its application entitled as above for a Writ of Certiorari, which said transcript of record was certified to under the hand of the Clerk of said Supreme Court of the State of California and the seal of said court on the 15th day of May, 1918.

Attached hereto and made a part hereof is a certified copy of the stipulation this day filed with the Clerk of the Supreme Court of the State of California by the respective attorneys for said plaintiff in error and said defendants in error, that said certified copy of said record may be taken as a return to said writ, said certified copy of said stipulation being certified to by the Clerk of this Court.

There is also attached hereto and made a part hereof the Writ of Certiorari to which this return is made.

Witness the Honorable Frank M. Angellotti, Chief Justice of the Supreme Court of the State of California, on this the 3d day of July, A. D. 1918.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of said Supreme Court of the State of California,
By W. R. MARKRILLE,
Chief Deputy Clerk.

In the Supreme Court of the State of California, San Francisco.

No. 8583.

SOUTHERN PACIFIC COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem, Respondents.

Stipulation for Certification of Record by the Clerk to the Supreme Court of the United States.

Whereas, heretofore the petitioner above named applied as plaintiff in error to the Supreme Court of the United States for a Writ of Certiorari to bring up for review the final judgment of said Supreme Court of the State of California in the above entitled cause;

And whereas, on the filing of and as a part of said application said petitioner filed with the Clerk of the Supreme Court of the United States a certified transcript of record, certified to by the Clerk of said Supreme Court of the State of California and embracing copies of the following records and papers:

1. Petition for writ of review;
2. Order granting writ;
3. Writ and return of service thereof;
4. Commission's return to the writ;
5. Opinion of the Supreme Court;
6. Petition for rehearing;
7. Order denying rehearing;
8. Copy of docket entries in said case;

which said copies were certified to by the Clerk of the Supreme Court of the State of California under the seal of said Supreme Court of the State of California and which said aforementioned papers constituted the entire transcript of record in the case in said Supreme Court of the State of California first above entitled, including all proceedings in said Supreme Court of the State of California;

And whereas, thereafter said Supreme Court of the United States ordered and on the 15th day of June, 1918, there was issued over the hand of the Clerk of and under the seal of said Supreme Court of the United States a Writ of Certiorari directing the certification by said Supreme Court of the State of California to said Supreme Court of the United States of the record and proceedings in said cause first hereinabove entitled;

And whereas, said cause now pending before said Supreme Court of the United States is entitled Southern Pacific Company, Petitioner, vs. Industrial Accident Commission of the State of California and Mary E. Butler and Albert Nelson Butler, a minor, by Mary E. Butler, his guardian ad litem, Respondents, and numbered in said

Supreme Court of the United States 1056 October Term, 1917, and 458 October Term, 1918;

Now, therefore, it is hereby stipulated by the undersigned attorneys, respectively, for said plaintiff in error and said defendants in error in said Supreme Court of the United States, each of which said attorneys is a member of the bar of said Supreme Court of the United States, to-wit: That said certified record of said Clerk of the Supreme Court of the State of California, consisting of said papers and proceedings numbered 1 to 8, inclusive, and above specified and so filed on said application by said Southern Pacific Company for a Writ of Certiorari may be taken as a return by said Supreme Court of the State of California and by the Clerk thereof and as a complete return to said Writ of Certiorari dated as aforesaid June 15, 1918, and that a certified copy of this stipulation may be sent up by said Clerk of the Supreme Court of the State of California as a part of his return to said writ of certiorari.

Dated at San Francisco, California, this 29th day of June, A. D. 1918.

(S'g'd) HENLEY C. BOOTH,
Attorney for Plaintiff in Error.

(S'g'd) CHRISTOPHER M. BRADLEY,
Attorney for Defendants in Error.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, the undersigned, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a full, true and correct copy of a stipulation filed with me in the cause first entitled as above and so filed on the 3d day of July, 1918, and that I am acquainted with the signatures of counsel who signed said stipulation and verily believe that their signatures to the original stipulation so filed are their true and genuine signatures. That said counsel are each admitted to practice in this Court and that each of them was an attorney of record in the cause first entitled as above.

Witness my hand and the seal of said Supreme Court of the State of California on this the 3d day of July, A. D. 1918.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of said Supreme Court of the State of California,
By W. R. MARKRILLE,
Chief Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Being informed that there is now pending before you a suit in which Southern Pacific Company is petitioner, and Industrial Accident Commission of the State of California and Mary E. Butler and Albert Nelson Butler, a minor, by Mary E. Butler, his guardian ad litem, are respondents, which suit was removed into the said Supreme Court by virtue of a writ of review addressed to the Industrial Accident Commission of the State of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of June, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,533. Supreme Court of the United States, No. 1066, October Term, 1917. Southern Pacific Company vs. Industrial Accident Commission of the State of California et al. Writ of Certiorari.

[Endorsed:] No. 1066, Oct. Term, 1917. Also No. 458, October Term, 1918. In the Supreme Court of the United States. Southern Pacific Company, Plaintiff in Error, vs. Industrial Accident Commission of the State of California and Mary E. Butler and Albert Nelson Butler, a minor, by Mary E. Butler, his guardian ad litem, Respondents. Return to Writ of Certiorari. Henley C. Booth, Attorney for Petitioner, 65 Market Street, San Francisco, Cal.

[Endorsed:] File No. 26,533. Supreme Court U. S. October Term, 1918. Term No. 458. Southern Pacific Co., P. E., vs. Industrial Accident Commission, &c. Writ of Certiorari & Return. Filed July 10, 1918.

No. 10[redacted]118

No. .....

In the Supreme Court of the United States
OCTOBER TERM, 1917

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner and Plaintiff in Error,
vs.
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem,*
Respondents and Defendants in Error.

MOTION AND NOTICE OF MOTION
For Writ of Certiorari to the Supreme Court of the State of California.

HENLEY C. BOOTH,
Attorney for Petitioner.

WM. F. HERRIN,
Of Counsel.

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1917

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner and Plaintiff in Error,
vs.
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem*,
Respondents and Defendants in Error.

NOTICE OF MOTION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of California.

To the respondents in the above entitled action and to their attorney, *Christopher M. Bradley, Esq.*:

Please take notice that on Monday, the third day of June, 1918, at the opening of the above entitled Court on that day, or as soon thereafter as counsel may be heard, Southern Pacific Company, petitioner herein, will, upon its verified petition and copies of the entire record in this cause, submit to the Supreme Court of the United States, in its courtroom at the Capitol, in the City of Washington, District

of Columbia, a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you, in compliance with the rules of said Court, and more than three weeks before the said 3rd day of June, 1918.

Dated San Francisco, California, May 8, 1918.

HENLEY C. BOOTH,
Attorney for Petitioner.

WILLIAM F. HERRIN,
Of Counsel.

PROOF OF SERVICE

Due service and receipt of a copy of the foregoing notice and of the petition for writ of certiorari and brief in support of said petition and motion and of a copy of said motion, are hereby acknowledged this 10th day of May, 1918.

.....

Attorney for Respondents.

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1917.

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem*,

Respondents and Defendants in Error.

MOTION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of California.

Comes now Southern Pacific Company, a corporation, by its attorney, appearing in that behalf, and moves this Honorable Court that it shall, by certiorari or other process, directed to the Honorable Justices of the Supreme Court of the State of California and to said Supreme Court, require said Court to certify to this Court for its review and determination a certain cause in said Supreme

Court of the State of California lately pending, wherein Southern Pacific Company was petitioner, and the Industrial Accident Commission of the State of California and Mary E. Butler and Albert Nelson Butler, a minor, by Mary E. Butler, his guardian *ad litem,* were respondents, which said cause was numbered on the docket of said Supreme Court of the State of California as San Francisco No. 8583; and to that end your petitioner now tenders herewith its petition, containing a brief statement of the facts and objects of this motion, and also tenders herewith a brief in support thereof, and also tenders herewith a certified copy of the entire record in said cause in said Supreme Court of the State of California.

Dated San Francisco, California, May 8, 1918.

HENLEY C. BOOTH,
Attorney for Petitioner.

WM. F. HERRIN,
Of Counsel.

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1917

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem*,

Respondents and Defendants in Error.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Southern Pacific Company, respectfully prays for a writ of certiorari to the Supreme Court of the State of California, to require that there be certified to this Court for review and determination a final judgment rendered by said Supreme Court of the State of California wherein there was drawn into question an authority exercised under said State of California, on the ground

of its being repugnant to the Constitution and laws of the United States, and the decision therein was against the applicability of said Constitution and laws, and wherein there was claimed by your petitioner a right, privilege and immunity under the Federal Employers' Liability Act of April 27, 1908, *Chap.* 149, 35 *Stats.* 65, which claim of right, privilege and immunity was denied by said Supreme Court of the State of California.

This application is made under the provisions of Section 237 of the Judicial Code, as amended September 6, 1916, *Chap.* 448, 39 *Stats.* 726.

The opinion of the Supreme Court of the State of California is not yet printed in the Pacific Reporter or in the official California Reports. Therefore, for convenient reference, a copy thereof follows this petition. It is also in the certified record filed herewith.

The case was originally that of a claim filed with the Industrial Accident Commission of California under the Workmen's Compensation, Insurance and Safety Act of the State of California, which is Chapter 176 of the California Statutes of 1913, as amended by Chapter 607 of the California Statutes of 1915. This act is of a class of workmen's compensation statutes familiar to this Court, which proceed on the theory of limited awards, irrespective, except in certain aggravated cases, of the negligence of the employer or the employee, therein differing

from the Federal ~~Workmen's Compensation~~ Employers Liability Act, the statute here relied on. The California statute above referred to provides in Section 69 (c) *(Chapter* 586, *Laws of* 1917) that:

> "This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

Before entering upon a brief statement of the facts upon which certiorari is applied for, it may be well to outline the procedure provided for by the California statutes from the initiation of a claim with the Industrial Accident Commission to the adjudication by the State Supreme Court of the validity of an award.

Under the California statute it is provided that a written application shall be filed with the Commission. On the filing of such application notice is given to the defendant, who answers in writing, and thereupon a day is set for a hearing at which evidence may be received. When the testimony is closed, the matter is to be submitted to the Commission, which is required by the Act (*Sec.* 20, *Chap.* 586, *Laws* 1917) to make and file "its findings upon all facts involved in the controversy and its award which shall state its determination as to the

rights of the parties." If an award is made against the defendant, he must, before he can obtain a judicial review of that award, apply to the Commission for a rehearing, specifically assigning the grounds therefor and making a general statement of the evidence upon which he relies (*Sec.* 64, *Chap.* 586, *Cal. Laws* 1917).

If a rehearing be denied, he may, within thirty days thereafter (*Sec.* 67, *Chap.* 586, *Cal. Laws* 1917) apply to the Supreme Court of the State of California, which is the highest Court of the state, or to a District Court of Appeal, which is an appellate Court intermediate between the *nisi prius* Courts and the Supreme Court, for a "writ of certiorari or review hereinafter referred to as a writ of review, for the purpose of having the lawfulness of the original * * * award * * * inquired into and determined."

It is provided by section 67 that the review shall not be extended further than to determine whether:

> "(1) The commission acted without or in excess of its powers.
>
> (2) The order, decision or award was procured by fraud.
>
> (3) The order, decision, rule or regulation was unreasonable.
>
> (4) If findings of fact are made, such findings of fact support the order, decision or award under review.

(5) The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the Court shall enter judgment either affirming or setting aside the order, decision or award or may remand the case for further proceedings before the commission."

There is no other method, under the California Statutes, of reviewing or annulling an award made by the commission.

The commission's award, however, is not a judgment upon which a writ of execution can be issued. It is provided by the act (*Sec.* 21, *Chap.* 586, *Cal. Stats.* 1917) that a certified copy of the findings and award of the commission may be filed with the Clerk of the Superior Court of any county of the state, whereupon he enters judgment against the defendant in conformity with the award upon which judgment it follows under the California practice that a writ of execution may be issued.

Under the California practice a petition for rehearing may be filed with the Supreme Court of the state within twenty days after the rendition of an opinion.

With this petition for certiorari as required by the rules of this Court, we herewith file a certified copy of the entire transcript of record in this case, which certified copy includes:

(1) The petition of the Southern Pacific Company to the Supreme Court of California for a writ of review, which petition contains a statement of the proceedings and evidence before the Industrial Accident Commission;

(2) The order for a writ of review made by the Supreme Court;

(3) The writ itself;

(4) The return of the respondent, Industrial Accident Commission, to the writ which sets forth the testimony and admits the truth of the allegations of fact contained in the petition for the writ;

(5) The opinion of the Supreme Court of California dismissing the writ and affirming the award made by the commission, a copy of which, for more convenient reference of this Court, also follows this petition;

(6) A copy of the petition to the Supreme Court of California for a rehearing;

(7) A copy of the order denying the petition for a rehearing.

It will be seen from the records just referred to that an award was made by the Industrial Accident Commission against the petitioner herein, the Southern Pacific Company, notwithstanding that there was specifically pleaded by the Southern Pacific Company, in the written answer filed by it with the commission, the defense that at the time of the accident which resulted in the death of the claimant's husband, the defendant, Southern Pacific Company, was a common carrier by railroad, engaged in commerce between and among the state of California and the states adjacent thereto, and that the decedent was at the time of said accident then and there employed by defendant, Southern Pacific Company, in such commerce, and therefore that said Industrial Accident Commission had no jurisdiction over said application or claim. It will further be seen that testimony on said issue was taken by the commission, that said issue was specifically disposed of by it in its award, that such disposition was adverse to the special defense because of the commission's belief that the work in question was only "preliminary" to the interstate commerce admittedly being carried on by the defendant and that therefore the defendant Southern Pacific Company was liable to pay an award amounting to $4,517.52—three times the average annual earnings of the deceased. The record further shows that upon the entry of said award there was seasonably filed an application to the commission for a rehearing, which application was denied, and upon the denial

of which and within the proper time the Supreme Court of California on the railroad company's petition granted a Writ of Review to determine the lawfulness of the award.

That on the consideration of the return to the writ of review, the only question at issue and the only question determined by the Supreme Court of California was whether, on the admitted facts and the findings of the commission, there was such an employment in interstate commerce at the time of the fatal accident as to remove the case from the jurisdiction of the commission and remit the claimant for her sole relief to the Federal Employers' Liability Act.

On this question the California Supreme Court divided, four of the seven justices holding that the employment was too remote from the interstate commerce then being carried on to form a part of it, two of the justices holding that the decedent was engaged in keeping in usable condition an instrumentality of interstate commerce and was engaged in service so closely related to interstate commerce as to be in legal contemplation a part thereof and one of the justices not participating in the decision.

The record is free from dispute as to the facts. The legal conclusion from those facts is all that was before the California Supreme Court or is involved in this petition for certiorari.

STATEMENT OF FACTS

The record shows without conflict or contradiction that the Southern Pacific Company, at the time of the fatal accident, was engaged, among other things, in operating in Alameda County, California, a system of electric suburban and interurban lines, which connected with its system of steam roads, and which electric lines carried passengers, mail, baggage and express in interstate commerce. That the power for these lines was generated at a steam power station in Fruitvale, Alameda County, whence it was sent forth by transmission lines on an uninterrupted journey toward and to the motors in the electric cars, which transformed the electric energy into a mechanical energy. That on this uninterrupted journey it passed without pause, through a reducing or transforming station, which lowered the voltage and changed the current of energy from an alternating current to a direct current.

The decedent, Butler, was an electric lineman. At the time of the fatality, he was engaged in wiping insulators on a pole which carried a transmission line over which the electric energy was flowing from the power house on its uninterrupted journey through the transforming station to the car motors on the cars *which were then being operated in interstate commerce.* The pole on which he was working was between the power house and the transforming station, and doubtless, for this reason, the commission

found, as it did, *as a conclusion of law,* that the work he was doing was only "preliminary" to the interstate commerce then being carried on. The reasons for the majority opinion of the California Supreme Court are stated therein.

The commission, however, found as follows, and this finding was the basis for the majority opinion (*italics ours*):

> "1. That William T. Butler, husband of Mrs. Mary E. Butler, one of the applicants herein, was injured on the 21st day of June, 1917, at Oakland, California, while in the employment of defendant, Southern Pacific Company, as an electric lineman.
>
> 2. That said injury arose out of and happened in the course of said employment, was proximately caused thereby, and occurred while the injured employee was performing service growing out of and incidental thereto.
>
> 3. That said injury occurred in the manner and under conditions and circumstances as follows: Said employee received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death on June 23, 1917; that at the time said employee sustained said injury the defendant maintained a main power house at or near Fruitvale, Alameda County, California; that at said power house the electricity used by defendant in the operation of its electric cars in said Alameda County is manufactured and from said power house transmitted by main line to its West Oakland substation and to its Berkeley substation, *at which point the electricity is reduced and transmitted direct to*

the trolley wires which operate the electric cars of the defendant on its different electric lines in said Alameda County; that the said employee at the time he received his said injury was working on one of the main lines by which the electricity is transmitted from said Fruitvale to West Oakland and Berkeley substations and *was doing work that was necessary to keep said main electric lines in a workable and usable condition* in order that the electricity might be transmitted as aforesaid; that at the time of said injury the said defendant was a common carrier by railroad engaged in interstate commerce between different states of the United States; *that said electric cars were used at the time of said injury for both interstate and intrastate commerce;* that while said employee was working as aforesaid between said power house and said substation the electricity which caused said electric shock had not reached its point of distribution to said electric cars and he was employed in work *preliminary* to the *running* of said electric cars; and that, therefore, he was not employed in interstate commerce."

There was no evidence of negligence on the part of either the railroad company or the electric lineman. The Federal Employers Liability Statute was relied upon by the Railroad Company.

A brief containing references to authorities relied upon on this application follows this application.

REASONS WHY IT IS RESPECTFULLY SUBMITTED THAT CERTIORARI SHOULD BE GRANTED.

(1) Section 69 (c) of the California Workmen's Compensation Act deprives the commission of jurisdiction in cases falling under the Federal ~~Workmen's Compensation Act~~ Employers Liability Act;

(2) It clearly appears from the undisputed evidence upon which the Supreme Court of the State of California based the decision here sought to be reviewed:

(a) That the electric power line on which decedent was working was then and there an instrumentality of interstate and he was then and there "keeping in usable condition" such instrumentality (*Shanks* vs. *D., L. & W. Ry.*, 239 *U. S.* 556), and he was engaged in keeping an instrumentality "in a proper state of repair while used in interstate commerce, which service is so closely related to said commerce as to be in practice and in legal contemplation a part of it." (*Pederson* vs. *D., L. & W. Ry. Co.*, 229 *U. S.* 146.)

(b) The case is to be distinguished from cases where a potential energy such as coal is stored against future use, because in this case the energy which caused the death was moving through an instrumentality upon which decedent was engaged in work necessary to keep it in a usable condition, and such energy was flowing on an uninterrupted journey toward the car motors where it was transformed into the mechanical power necessary to carry on the interstate commerce then being engaged in by the railroad company.

As to the legal effect of these admitted conditions we shall have more to say in the brief which follows.

WHEREFORE, your petitioner prays that in order that it may challenge the authority to affirm an award against it under said Workmen's Compensation Act on the ground that the exercise of said authority is repugnant to the Constitution and laws of the United States, and that it may effectively assert and rely upon a right, privilege and immunity claimed by it under a statute of the United States, to-wit, the Federal Employer's Liability Act of April 22, 1908, that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Justices of the Supreme Court of the State of California and to said Supreme Court of the State of California, requiring them to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of the proceedings of said Supreme Court of California, in the above entitled matter, to the end that the judgment of said Supreme Court of California may be reviewed, as provided by law, and that this Honorable Court may thereupon proceed to correct the errors complained of, reverse said judgment and remand said cause, and grant your petitioner such other and further relief in the premises as the nature of the case may require and in conformity with law.

And, whereas, hitherto and prior to the enactment of the amendment of Section 237 of the Federal Judicial Code of September 6, 1916 (39 *Stats.* 726) judgments of a Court of last resort of a state affirming a liability under a state Workmen's Compensation Act where federal questions were raised and relied upon have been under common practice reviewed by this Court upon Writs of Error, and, whereas, this Court has not, to the knowledge of your petitioner, definitely passed on the scope and limitations of said amendment to said Section 237, your petitioner, nevertheless believing that certiorari is the proper remedy in the instant case, respectfully petitions that if certiorari herein be denied on the sole ground that a writ of error should have been applied for, that your Honorable Court treat this application and the certified record sent herewith as an application for a writ of error and thereupon issue such writ of error, so that the proceedings before said Supreme Court of California may be certified up in the same manner as though a writ of error had been applied for herein originally, and that to that end your Honorable Court treat this application and the brief herein as assignments of error for that purpose.

And your petitioner will ever pray, etc.

SOUTHERN PACIFIC COMPANY,
Petitioner and Plaintiff in Error,
By WM. SPROULE,
President.
HENLEY C. BOOTH,
Attorney for said Petitioner.

WM. F. HERRIN,
Of Counsel.

State of California,
City and County of San Francisco—ss.

HENLEY C. BOOTH, being first duly sworn, deposes and says:

I am an attorney and counsellor of the Supreme Court of the United States; I am the attorney for Southern Pacific Company, the petitioner named in the foregoing petition for a writ of certiorari; the allegations of said petition are true, as I verily believe; the points raised therein are, in my opinion, meritorious; said petition is not filed for the purpose of delay.

HENLEY C. BOOTH.

Subscribed and sworn to before me,
this 8th day of May, 1918.
(NOTARIAL SEAL)
E. B. RYAN, Marguerite F. Brun
Notary Public in and for the City
and County of San Francisco, State
of California.

COPY OF OPINION AND ORDER OF SUPREME COURT OF CALIFORNIA HERE SOUGHT TO BE REVIEWED.

S. F. No. 8583. In Bank. March 25, 1918.

SOUTHERN PACIFIC COMPANY, *Petitioner*, v. INDUSTRIAL ACCIDENT COMMISSION, *et al.*, *Respondents*.

Petition for writ of review prayed for against the Industrial Accident Commission of the State of California.

The Industrial Accident Commission made an award in favor of the dependents of William T. Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda county, its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substations the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars.

When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations.

This writ of review was issued to test the validity of the employer's claim that the commission was without jurisdiction to make an award, for the reason that Butler was engaged in interstate commerce, within the purview of the act of Congress of

April 22, 1908. In its findings the commission, after setting forth in some detail the circumstances surrounding the employee's injury, declares "that while said employee was working as aforesaid between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric cars, and he was employed in work preliminary to the running of said electric cars, and that, therefore, he was not employed in interstate commerce."

Upon the question whether a given employment falls with the scope of the federal act we must look to the decisions of the Courts of the United States as of controlling force. In *Shanks* v. *Del., L. & W. R. R. Co.* (239 U. S. 556), the Court said: "The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" The commission was, no doubt, seeking to apply this test, and we take it that the word "preliminary," though perhaps not an altogether appropriate term, was used by it in its finding to express the idea that the work in which Butler was engaged was not so closely related to interstate transportation as to be a part of it.

The opinion in the Shanks case refers to a number of earlier cases in which, upon varying facts, the federal statute had been held to be applicable or inapplicable. Upon examination of these decisions, it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation. In this Court it has been held that a mechanic engaged in repairing a switch engine which was used in the transportation of commerce, interstate and intrastate, was engaged in interstate commerce within

the meaning of the act. (*Southern Pac. Co.* v. *Pillsbury,* 170 Cal. 782); that a watchman on a main steam line was engaged in interstate commerce (*Southern Pac. Co.* v. *Industrial Acc. Com.,* 174 Cal. 8); as was a lineman who was removing a telephone wire which had fallen on the trolley wire of the same lines involved in this proceeding. (*Southern Pac. Co.* v. *Industrial Acc. Com.,* 174 Cal. 19.)

In *C. B. & Q. R. R. Co.* v. *Harrington* (241 U. S. 177), the Supreme Court of the United States had occasion to consider a state of facts more closely analogous to the situation here presented. The injured employee was a member of a switching crew which was engaged in switching cars of coal belonging to the railroad company. The coal was being switched to a shed, where it was to be placed in bins and chutes, and supplied as needed to locomotives engaged in interstate as well as intrastate transportation. It was held that the Federal Employers' Liability Act was not applicable. Applying the test laid down in the Shanks case, the Court said that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use." [1] The reasoning is apt here. The coal was essential to the production of motive power for the locomotives, just as, in this case, the electric current was necessary to move petitioner's cars. But in moving the coal to the shed, Harrington was engaged in a work which was at least one step removed from the actual furnishing of the coal to the engines, and this precluded that close relation of his work to interstate commerce which would bring him within the scope of the federal act. So, in this case, Butler was working on the part of the line between the main power house and a substation. The current was still to pass through the transformers and converters, and be so converted and reduced as to be

suitable for use in propelling the cars. The test of remoteness seems as applicable in the one case as in the other. It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current at any point, however remote from the lines of track, would immediately stop the progress of all cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says, "the federal act speaks of interstate commerce in a practical sense suited to the occasion." (*Shanks* v. *Del., Lack. & West. R. R., supra; C. B. & Q. R. R.* v. *Harrington, supra.*) Viewing the question before us in this light, we think the answer to it should be the same as that given in the Harrington case. The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting on to the trolley line the necessary power to be used by the operatives of the road as desired—or, to paraphrase the language already quoted from the Harrington case, "putting the electric power [coal supply] in a convenient place from which it could be taken as required for use."

We think, therefore, that the commission was justified in exercising jurisdiction.

The award is affirmed.

SLOSS, J.

We concur:
ANGELLOTTI, C. J.
VICTOR E. SHAW, J., *pro tem.*
RICHARDS, J., *pro tem.*

DISSENTING OPINION.

I dissent.

The test is stated by the Supreme Court of the United States to be "was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" The deceased was engaged in working upon an insulator that supported a wire that was actually in use in moving trains engaged in interstate commerce, and was killed by a fall resulting from a shock caused by an escape of some of the electric current so used. His connection with the actual movements of trains was so direct that had all the current short-circuited through his body its effect on the trains in motion would have been instantaneous.

The electricity in question was generated at a steam generating plant at Fruitvale. That steam plant was just as truly operating the moving cars, as though the steam had been generated in a locomotive attached to the train. The electric transmission line was merely a means of conducting that power to the train and in no sense differs in legal contemplation from the system of transmission of power by cable to the cars of a cable railroad. It is merely a means to an end; an instrumentality for moving interstate commerce; a method of applying the potential energy of coal and fuel oil to the movement of a train. The instant the potential energy was converted into kinetic energy it became the

proximate cause of train movement, and the instrumentalities used in applying it to the interstate commerce is as much a part of the system of transportation as the car in which the passenger or freight rides, The intimate connection with the actual movement of trains is shown by the fact that the instant the power plant ceases to operate, or the transmission wire breaks, the car upon the railroad track, whether it be ten miles or five hundred miles away, immediately stops. The fact that in transmitting this power, it passes through what is known as transforming stations has no significance whatever. It must be conceded that distance is not a factor in the determination of the question whether or not a person is engaged in interstate commerce. For instance, no one would doubt that if a train despatcher on Eiffel Tower, Paris, operated trains on an interstate railroad in California from there, he would be engaged in interstate commerce. The question of the method of the transmission of his orders would likewise be immaterial. He might use wireless across the Atlantic ocean, a telegraph wire from New York to San Francisco, and a telephone from San Francisco to the station agent, who writes the message and hands it to the conductor. It would make no difference if the message was originally written and transmitted in French and was afterwards translated into English. It is obvious that the true question is, "Were the messages that were sent by the train despatcher obeyed by the train crews in operating their trains?" So the question here is, "Was the power passing along the power line the proximate cause of the motion of the trains?" If so, those engaged in operating or maintaining the devices by which the power is transmitted would, upon the principle above stated, be engaged in interstate commerce. That this power so transmitted was the proximate cause of the movement of the trains would seem to be conclusively answered in the affirmative by the fact that any break in the power line instantaneously affects the

moving trains. The transforming stations referred to in the majority opinion are merely a means to an end, viz., the transmission of the power from the steam plant to the train. The fireman in the generating plant is as truly engaged in moving interstate commerce as is the fireman of a locomotive hauling such commerce. In each case the fireman is putting into the firebox potential energy in the form of coal or oil. That energy before it is applied to the cars must first be converted into heat, a form of kinetic energy, and then from heat into train motion. The fact is that both are actually engaged in moving the train by the process of converting the potential energy stored in coal or oil into the movement of a train. If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy, and then used out of the storage batteries, as in the case of an electric automobile, the situation might be analogous to that referred to in *C. B. & Q. R. R.* v. *Harrington*, 241 U. S. 177, but under the agreed facts there is no storage whatever. This case cannot be distinguished in principle from the case of *Southern Pacific Co.* v. *Industrial Accident Comm.*, 174 Cal. 8, where a lineman was killed while engaged in removing a telephone wire which had fallen on a "trolley wire of the same line involved in this proceeding." The power transmission line was but an extension of the trolley wire, as much a part of the system as feed wires along the track, or the span wires supporting the trolley wires.

WILBUR, J.

I concur:
MELVIN, J.

BRIEF

In the Supreme Court of the United States
OCTOBER TERM, 1917.

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner and Plaintiff in Error.
vs.
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem*,
Respondents and Defendants in Error.

BRIEF IN SUPPORT OF PETITION AND MOTION FOR WRIT OF CERTIORARI.

Treating the foregoing petition as a statement of facts, without repeating the facts as therein stated, there remains, after the Court has examined the petition, and the opinion of the Supreme Court of the State of California which immediately precedes this brief, little to add by way of citation of authority, and little to add to the dissenting opinion of the California Supreme Court, to differentiate this case from the decisions of this Court relied upon by the majority opinion of the California Supreme Court.

We have shown by the petition, supported by the certified record herewith filed, that from the mo-

ment of the petitioner's appearance before the Industrial Accident Commission the defense that the decedent was employed in interstate commerce at the time he was killed and that therefore the case falls exclusively under the Federal Employers' Liability Act, was asserted by the railroad company, was considered and definitely passed upon and denied by the commission in its findings, and was the only point considered by the Supreme Court of the state on its review of the Commission's award.

It clearly appears that the decedent was employed by a railroad carrier engaged at that time in the actual running of electric cars which were then and there employed in interstate commerce. That at the time he was killed he was "doing work that was necessary" to keep the electric line on which he was working "in a workable and usable condition." The commission itself so found. That the point where he was working was between the power house, where the electricity was generated, and the reducing or transforming station through which the electricity passed on an uninterrupted journey from the power house toward the car motors of cars which were "used at the time of such injury for both interstate and intrastate commerce." (Commission's Finding, our petition *supra.*)

The divergence of opinion between the majority and the minority of the Court arose, according to the majority opinion, upon the question of the applicability of *C. B. & Q. R. R. Co.* vs. *Harrington,*

241 U. S. 177. In that case, Harrington was engaged "in switching coal belonging to defendant and which had been standing on a storage track for some time, to the coal sheds where it was to be placed in bins or chutes and supplied, as needed, to locomotives"—it being conceded by the Court, for the sake of the argument, that the coal so placed was to be used by locomotives in interstate hauls—if ever used at all. But in the *Harrington* case there was a storage of a tangible commodity whose movement in any kind of commerce had ended but was in storage (p. 179) and which, *if ever used,* would be used in interstate commerce for the purpose of generating steam by the combustion of the coal under the boilers of locomotives employed in such commerce. Upon those facts it was held by this Court that "there was no such close or direct relation in interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use." The *Harrington* case is solely and entirely one of storage of fuel against future needs. It is not, as is this case, one of continuous and uninterrupted transmission of the very electrical energy—a kinetic, a moving energy—*which was then entering the car motors and being transformed into mechanical power.*

It may be differentiated, as said by Mr. Justice Wilbur, in the dissenting opinion in the case at bar, by the observation that:

> "If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy and then used out of the storage batteries as in the case of an electric automobile, the situation might be analogous to 'the *Harrington* case,' but under the agreed facts, there is no storage whatever."

Closely analogous to the instant case are such illustrations as a coal chute leading from a bin to the tender of a locomotive where the coal on its journey toward the tender passes through an automatic breaker which reduces it to a size suitable for the firebox, or the case of a water pipe leading from a water tank to the tender of a locomotive, where, midway between the tank and the tender, there is an apparatus automatically changing the chemical constituents of the water so as to prevent boiler scale in the boiler of the locomotive—a not unusual treatment of water intended for locomotives.

In neither case just referred to do we think it could be said that the coal chute or the pipe was not an instrumentality of interstate commerce, and in neither case, we respectfully submit, would it make any difference whether a man engaged in the keeping of such coal chute or such pipe in a usable condition so that coal or water *then* on its way to the tender might proceed uninterruptedly, would be held to be within or without the provisions of the Federal Employers' Liability Act according to

whether he was between the breaker and the tender in the one case, or the chemical apparatus and the tender in the other case. Nor would it matter in those cases what length the coal chute or the water pipe might be, provided there was continuous transmission through them from the place of storage to the locomotive. In both cases that which was necessary to the operation of the interstate locomotive would have already left its storage place, whereas, in the *Harrington* case, the commodity was being put in a storage place.

In the case at bar there was no interruption in the progress of the electrical energy from the time it left the power house to the time it entered the car motors. That it passed through a transforming or reduction station would not break the continuity of its flow, or the necessity of such continuity for the operation of the car motors toward which it was proceeding with the speed of light, or change its status to that of a fuel stored for future use.

We respectfully take issue with the statement in the majority opinion that "the main line is not part and parcel of the railroad or its equipment in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served

by wagons or cars laden with coal to be carried to the road for the operation of its locomotives."

It is true that the main power line in the case at bar is not "part and parcel of the railroad," speaking of a railroad only as a right of way and cars running thereon, but it is part of the equipment of the railroad, and part of an operating unit, just as much as the trolley line, because, without its flow the trolley wire or line could not become energized and without that energy constantly present the motors would not function. If the argument of the majority is carried to its logical conclusion, then in a case like this the trolley line is not a part of the railroad or its equipment, because it is merely "an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied." We respectfully submit that an operating unit cannot be so dislocated or dissected.

Moreover, the case at bar differs essentially from the *Harrington* case, in that it is conceded by the record and by the majority opinion of the Court that if the current passing through the line on which Butler was working at the time of the fatal accident had been so short circuited as to cease its onward journey from the point where it was short circuited, the cars would have stopped. Not so in the *Harrington* case in respect to the coal being switched by him to the bins or chutes where it was stored against a future use which might never be made.

It is conceded by the California Court and by the finding of the Commission that Butler's work "was necessary to keep said main electric lines in a workable and usable condition," the obvious conclusion being that, if such lines were not kept in a workable and usable condition, the furnishing of the electricity necessary to the operation of the car motors would be materially interfered with, if not stopped, thereby immediately interfering with the interstate commerce which, as conceded by the Court and found by the Commission, was then and there being carried on by those cars.

Nor is the case at bar analogous to the *Shanks* case (*Shanks* vs. *D., L. & W. Ry,* 239 U. S. 556), wherein one engaged in putting up a shafting which was to carry a belt, which in turn would impart power to a machine, which in turn would be used in making repair parts for instrumentalities of interstate commerce was held to be too remote from the interstate commerce then being carried on. In the case at bar, Butler was as closely connected with the interstate commerce then being carried on as he would have been if he had been working in the transforming station, or on the wire between the transforming station and the trolley wire, or on the trolley wire itself, and in the latter case it was held by the California Supreme Court itself in *Southern Pacific Company* vs. *Industrial Accident Commission,* 174 Cal. 19, cited with approval in the majority and minority opinions in this case, that a lineman so

engaged on a trolley wire was employed in the commerce then being carried on on the very electric line here considered.

Again, we must respectfully dissent from the concluding language of the majority opinion which paraphrases an expression in the *Harrington* case by saying that Butler was only engaged in "putting the electric power (coal supply) in a convenient place from which it could be taken as required for use."

We respectfully suggest that the majority opinion fails to differentiate between the storage of fuel of potential energy and the direct transmission of kinetic energy in an uninterrupted journey from the place where it is generated to the place where it is changed from electrical energy to mechanical energy, namely the car motor.

It is respectfully submitted that inasmuch as the electric line on which decedent was working was, then and there, an instrumentality of interstate commerce, he was "keeping in usable condition" such instrument (*Shanks* case, 239 U. S. 556), and was engaged in keeping such instrumentality "in a proper state of repair while used in interstate commerce, which service is so closely related to said commerce as to be, in practice and in legal contemplation, a part of it." (*Pedersen* case, 229 U. S. 146.)

In the commission's award, it drew the legal conclusion from the admitted facts that Butler's work was, as it said, only "preliminary" to interstate commerce. The majority opinion concedes that this was not an altogether proper term, but states that it was used to express the idea that the work in which Butler was engaged was not so closely related to interstate commerce as to be a part of it. If the commission's finding, which is a pure conclusion of law that the work was only preliminary to interstate commerce, is to fall, as we respectfully submit that it should, then the entire award falls with it and the Supreme Court of California should have annulled the award instead of affirming it.

The word "preliminary" finds no place in the federal decisions under which alone the claimant's rights and the jurisdiction of the commission to make an award are to be adjudged.

The work of the switchman in the *Parker case* (*L. & N. Ry. Co.* vs. *Parker,* 242 U. S. 13), was only "preliminary" to the reaching and movement of an interstate car.

So also in the *Seale* case (*St. Louis, S. F. & T. R. Co.* vs. *Seale,* 229 U. S. 156), the work of the deceased yard clerk was only "preliminary" to the breaking up of the partly interstate train he had not even reached when he was killed.

"Preliminary" to interstate freight proceeding on its way was the work of the brakeman in the

Carr case (*N. Y. Central & H. R. Co.* vs. *Carr,* 238 U. S. 260), injured while setting out an interstate car on a siding.

And the fireman (*N. Car. R. Co.* vs. *Zachary,* 232 U. S. 248) who was killed while temporarily going away from an engine he had freshly oiled and fired for an interstate trip, but was shortly to rejoin, had only in such oiling and firing been engaged in work "preliminary" to actual transportation service interstate.

Yet in these cases as in all others where the Federal jurisdiction has been considered by Federal Courts the test applied was not the indefinite and inexpressive word "preliminary," but—as said in the *Carr* case, *supra*—was the injured employee "engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof," or, as said in the *Parker* case, *supra,* was the act being done "for the purpose of furthering the later work" (interstate commerce).

In conclusion, it is respectfully submitted that the Supreme Court of California was in error in depriving your petitioner of its defense under the Federal Employers' Liability Act, because in so doing it misconstrued and misapplied the decisions of this Court, and failed to observe, as said in Mr. Justice Wilbur's dissenting opinion, that

> "the instant the potential energy was converted into kinetic energy it became the proximate cause of train movement, and the instrumentalities used in applying it to the interstate commerce are as much a part of the system of transportation as the car in which the passenger or freight rides."

It is therefore respectfully submitted that certiorari should issue herein and that thereupon and on the coming up of the certified record, the Supreme Court of the State of California should be directed to annul the award made by the Industrial Accident Commission.

Respectfully submitted,

HENLEY C. BOOTH,
Attorney for Petitioner.

WM. F. HERRIN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

No. [redacted]118

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem,*

Respondents.

PETITIONER'S BRIEF ON CERTIORARI

To the Supreme Court of the State of California

HENLEY C. BOOTH,
801 Southern Pacific Building,
San Francisco, California,
Attorney for Petitioner.

WM. F. HERRIN,
Of Counsel.

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TABLE OF CASES AND CITATIONS

IN THE

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SOUTHERN PACIFIC COMPANY, a Corporation,

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vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a minor, by Mary E. Butler, his guardian *ad litem*,

Respondents.

PETITIONER'S BRIEF ON CERTIORARI

To the Supreme Court of the State of California

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

ABSTRACT OF THE CASE

Your petitioner, Southern Pacific Company, obtained from this Court a writ of certiorari to the Supreme Court of the State of California, under

which there has been certified to this Court for review and determination a final judgment rendered by said Supreme Court of the State of California wherein there was drawn into question an authority exercised under said State of California, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision therein was against the applicability of said Constitution and laws, and wherein there was claimed by your petitioner a right, privilege and immunity under the Federal Employers' Liability Act of April 27, 1908, *Chap.* 149, 35 *Stats.* 65, which claim of right, privilege and immunity was denied by said Supreme Court of the State of California.

The writ was granted under the provisions of Section 237 of the Judicial Code, as amended September 6, 1916, *Chap.* 448, 39 *Stats.* 726.

The opinion of the Supreme Court of the State of California of March 25, 1918, is not yet printed in the Pacific Reporter or in the official California Reports. Therefore, for convenient reference, a copy thereof follows this brief. It is also in the printed record at pp. 68-72.

The case was originally that of a claim (R. p. 12) filed with the Industrial Accident Commission of California under the Workmen's Compensation, Insurance and Safety Act of the State of California, which is Chapter 176 of the California Statutes of

1913, as amended by Chapter 607 of the California Statutes of 1915. This act is of a class of workmen's compensation statutes familiar to this Court, which proceed on the theory of limited awards, irrespective, except in certain aggravated cases, of the negligence of the employer or the employee, therein differing from the Federal Employers' Liability Act, the statute here relied on. The California statute above referred to provides in Section 69 (c) *(Chapter* 586, *Laws of* 1917*)* that:

> "This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

Before entering upon a brief statement of the facts it may be well to outline the procedure provided for by the California statutes from the initiation of a claim with the Industrial Accident Commission to the adjudication by the State Supreme Court of the validity of an award.

Under the California statute it is provided that a written application shall be filed with the Commission. On the filing of such application notice is given to the defendant, who answers in writing, and thereupon a day is set for a hearing at which evidence may

be received. When the testimony is closed, the matter is to be submitted to the Commission, which is required by the Act (*Sec.* 20, *Chap.* 586, *Laws* 1917) to make and file "its findings upon all facts involved in the controversy and its award which shall state its determination as to the rights of the parties." If an award is made against the defendant, he must, before he can obtain a judicial review of that award, apply to the Commission for a rehearing, specifically assigning the grounds therefor and making a general statement of the evidence upon which he relies (*Sec.* 64, *Chap.* 586, *Cal. Laws* 1917).

If a rehearing be denied, he may, within thirty days thereafter (*Sec.* 67, *Chap.* 586, *Cal. Laws* 1917) apply to the Supreme Court of the State of California, which is the highest Court of the state, or to a District Court of Appeal, which is an appellate Court intermediate between the *nisi prius* Courts and the Supreme Court, for a "writ of certiorari or review hereinafter referred to as a writ of review, for the purpose of having the lawfulness of the original * * * award * * * inquired into and determined."

It is provided by section 67 that the review shall not be extended further than to determine whether:

> "(1) The commission acted without or in excess of its powers.
>
> (2) The order, decision or award was procured by fraud.

(3) The order, decision, rule or regulation was unreasonable.

(4) If findings of fact are made, such findings of fact support the order, decision or award under review.

(5) The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the Court shall enter judgment either affirming or setting aside the order, decision or award or may remand the case for further proceedings before the commission."

There is no other method, under the California Statutes, of reviewing or annulling an award made by the commission.

The commission's award, however, is not a judgment upon which a writ of execution can be issued. It is provided by the act (*Sec.* 21, *Chap.* 586, *Cal. Stats.* 1917) that a certified copy of the findings and award of the commission may be filed with the Clerk of the Superior Court of any county of the state, whereupon he enters judgment against the defendant in conformity with the award upon which judgment it follows under the California practice that a writ of execution may be issued.

Under the California practice a petition for rehearing may be filed with the Supreme Court of the state within twenty days after the rendition of an opinion.

The printed record herein shows (references are to pages of *printed* record):

(1) The petition of the Southern Pacific Company to the Supreme Court of California for a writ of review, which petition contains a statement of the proceedings and evidence before the Industrial Accident Commission; (R. p. 1)

(2) The order for a writ of review made by the Supreme Court; (R. p. 8)

(3) The writ itself; (R. p. 9)

(4) The return of the respondent, Industrial Accident Commission, to the writ which sets forth the testimony and admits the truth of the allegations of fact contained in the petition for the writ; (R. p. 11-67)

(5) The opinion of the Supreme Court of California dismissing the writ and affirming the award made by the commission, a copy of which, for more convenient reference of this Court, also follows this Brief; (R. p. 68)

(6) A copy of the petition to the Supreme Court of California for a rehearing; (R. p. 70)

(7) Copies of the order denying the petition for a rehearing (R. p. 76), Supreme Court docket entry (R. p. 77) and Certificate of Clerk of California Supreme Court (R. p. 78).

It will be seen from the records just referred to that an award was made by the Industrial Accident Commission against the petitioner herein, the Southern Pacific Company, notwithstanding that there was specifically pleaded by the Southern Pacific Company, in the written answer filed by it with the commission, (R. p. 19-20) the defense that at the time of the accident which resulted in the death of the claimant's husband, the defendant, Southern Pacific Company, was a common carrier by railroad, engaged in commerce between and among the state of California and the states adjacent thereto, and that the decedent was at the time of said accident then and there employed by defendant, Southern Pacific Company, in such commerce, and therefore that said Industrial Accident Commission had no jurisdiction over said application or claim. It will further be seen (R. p. 22-30) that testimony on said issue was taken by the commission, that said issue was specifically disposed of by it in its award, (R. p. 337) that such disposition was adverse to the special defense because of the commission's belief that the work in question was only "preliminary" to the interstate commerce admittedly being carried on by the defendant (R. p. 33-34) and that therefore the defendant Southern Pacific Company was liable to pay an award amount-

ing to $4,517.52—(R. p. 35)three times the average annual earnings of the deceased. The record further shows that upon the entry of said award there was seasonably filed an application to the commission for a rehearing, (R. p. 61) which application was denied, (R. p. 76) and upon the denial of which and within the proper time the Supreme Court of California on the railroad company's petition (R. p. 1) granted a Writ of Review to determine the lawfulness of the award. (R. p. 9)

That on the consideration of the return to the writ of review, the only question at issue and the only question determined by the Supreme Court of California was whether, on the admitted facts and the findings of the commission, there was such an employment in interstate commerce at the time of the fatal accident as to remove the case from the jurisdiction of the commission and remit the claimant for her sole relief to the Federal Employers' Liability Act. (Opinion, R. p. 68)

On this question the California Supreme Court divided, four of the seven justices holding that the employment was too remote from the interstate commerce then being carried on to form a part of it, two of the justices holding (R. p. 70) that the decedent was engaged in keeping in usable condition an instrumentality of interstate commerce and was engaged in service so closely related to interstate commerce as to be in legal contemplation a part thereof and one of the justices not participating in the decision.

The record is free from dispute as to the facts. The legal conclusion from those facts is all that was before the California Supreme Court or is involved herein.

FURTHER STATEMENT OF FACTS

The record shows without conflict or contradiction and the commission found (R. p. 33) that the Southern Pacific Company, at the time of the fatal accident, was engaged, among other things, in operating in Alameda County, California, a system of electric suburban and interurban lines, which connected with its system of steam roads, and which electric lines carried passengers, mail, baggage and express in interstate commerce. That the power for these lines was generated at a steam power station in Fruitvale, Alameda County, whence it was sent forth by transmission lines on an uninterrupted journey toward and to the motors in the electric cars, which transformed the electric energy into a mechanical energy. That on this uninterrupted journey it passed without pause, through a reducing or transforming station, which lowered the voltage and changed the current of energy from an alternating current to a direct current.

It was further uncontradicted and so found (R. p. 33) that the decedent, Butler, was an electric lineman. That at the time of the fatality, he was engaged in wiping insulators on a pole which carried a trans-

mission line over which the electric energy was flowing from the power house on its uninterrupted journey through the transforming station to the car motors on the cars *which were then being operated in interstate commerce.* That the pole on which he was working was between the power house and the transforming station, and doubtless, for this reason, the commission found, as it did, *as a conclusion of law,* that the work he was doing was only "preliminary" to the interstate commerce then being carried on. (R. top p. 34) The reasons for the majority opinion of the California Supreme Court are stated therein.

The commission, however, (R. p. 33-34) found as follows, and this finding was the basis for the majority opinion of the California Supreme Court, *(italics ours):*

> "1. That William T. Butler, husband of Mrs. Mary E. Butler, one of the applicants herein, was injured on the 21st day of June, 1917, at Oakland, California, while in the employment of defendant, Southern Pacific Company, as an electric lineman.
>
> 2. That said injury arose out of and happened in the course of said employment, was proximately caused thereby, and occurred while the injured employee was performing service growing out of and incidental thereto.
>
> 3. That said injury occurred in the manner and under conditions and circumstances as follows. Said employee received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death on June 23, 1917;

that at the time said employee sustained said injury the defendant maintained a main power house at or near Fruitvale, Alameda County, California; that at said power house the electricity used by defendant in the operation of its electric cars in said Alameda County is manufactured and from said power house transmitted by main line to its West Oakland substation and to its Berkeley substation, *at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the defendant* on its different electric lines in said Alameda County; that the said employee at the time he received his said injury was working on one of the main lines by which the electricity is transmitted from said Fruitvale to West Oakland and Berkeley substations and *was doing work that was necessary to keep said main electric lines in a workable and usable condition* in order that the electricity might be transmitted as aforesaid; that at the time of said injury the said defendant was a common carrier by railroad engaged in interstate commerce between different states of the United States; *that said electric cars were used at the time of said injury for both interstate and intrastate commerce;* that while said employee was working as aforesaid between said power house and said substation the electricity which caused said electric shock had not reached its point of distribution to said electric cars and he was employed in work *preliminary* to the *running* of said electric cars; and that, therefore, he was not employed in interstate commerce."

There was no evidence of negligence on the part of either the railroad company or the electric lineman. The Federal Employers' Liability Statute was spe-

cifically relied upon by the Railroad Company by Answer, (R. p. 19) and by Petition to the Commission for Rehearing (R. p. 67) and was the only point considered by the Supreme Court (R. p. 68).

ASSIGNMENTS OF ERROR

Petitioner was deprived of an asserted Federal right because:

(1) Section 69 (*c*) of the California Workmen's Compensation Act deprives the commission of jurisdiction in cases falling under the Federal Employers' Liability Act. The Federal Act has the same effect.

(2) It clearly appears from the undisputed evidence upon which the Supreme Court of the State of California based the decision here sought to be reviewed:

> (a) That the electric power line on which decedent was working was then and there in active use as an instrumentality of interstate commerce and he was then and there "keeping in usable condition" such instrumentality (*Shanks* vs. *D., L. & W. Ry.*, 239 U. S. 556), and he was engaged in keeping an instrumentality "in a proper state of repair while used in interstate commerce, which service is so closely related to said commerce as to be in practice and in legal contemplation a part of it." (*Pederson* vs. *D., L. & W. Ry. Co.*, 229 U. S. 146.)
>
> (b) The case is to be distinguished from cases where a potential energy such as coal is

stored against future use, because in this case the energy which caused the death was moving through an instrumentality upon which decedent was engaged in work necessary to keep it in a usable condition, and such energy was flowing on an uninterrupted journey toward the car motors where it was transformed into the mechanical power necessary to carry on the interstate commerce then being engaged in by the railroad company.

(3) The Court erred in holding decedent's work when killed to have been too remote from the interstate commerce then being carried on in the electric cars.

BRIEF OF THE ARGUMENT

There remains little to add by way of citation of authority, and little to add to the dissenting opinion of the California Supreme Court, to differentiate this case from the decisions of this Court relied upon by the majority opinion of the California Supreme Court.

We have shown by the record that from the moment of the petitioner's appearance before the Industrial Accident Commission the defense that the decedent was employed in interstate commerce at the time he was killed and that therefore the case falls exclusively under the Federal Employers' Liability Act, was asserted by the railroad company, was considered and definitely passed upon and denied by the

commission in its findings, and was the only point considered by the Supreme Court of the state on its review of the Commission's award.

It clearly appears that the decedent was employed by a railroad carrier engaged at that time in the actual running of electric cars which were then and there employed in interstate commerce. That at the time he was killed he was "doing work that was necessary" to keep the electric line on which he was working "in a workable and usable condition." The commission itself so found (R. p. 33). That the point where he was working was between the power house, where the electricity was generated, and the reducing or transforming station through which the electricity passed on an uninterrupted journey from the power house toward the car motors of cars which were "used at the time of such injury for both interstate and intrastate commerce." (Commission's Finding, R. p. 33.)

The divergence of opinion between the majority and the minority of the Court arose, according to the majority opinion (R. p. 69), upon the question of the applicability of *C. B. & Q. R. R. Co.* vs. *Harrington,* 241 U. S. 177. In that case, Harrington was engaged "in switching coal belonging to defendant and which had been standing on a storage track for some time, to the coal sheds where it was to be placed in bins or chutes and supplied, as needed, to locomotives"—it being conceded by the Court, for the sake of the argu-

ment, that the coal so placed was to be used by locomotives in interstate hauls—if ever used at all. But in the *Harrington* case there was a storage of a tangible commodity whose movement in any kind of commerce had ended but which was in storage (p. 179) and which, *if ever used,* would be used in interstate commerce for the purpose of generating steam by the combustion of the coal under the boilers of locomotives employed in such commerce. Upon those facts it was held by this Court that "there was no such close or direct relation in interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use." The *Harrington* case is solely and entirely one of storage of fuel against future needs. It is not, as is the instant case, one of continuous and uninterrupted transmission of the very electrical energy—a kinetic, a moving energy—*which was then entering the car motors and being transformed into mechanical power.*

It may be differentiated, as said by Mr. Justice Wilbur, in the dissenting opinion in the case at bar, (R. p. 70) by the observation that:

> "If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy and then used out of the storage batteries as in the case of an electric automobile,

> the situation might be analogous to 'the *Harrington* case,' but under the agreed facts, there is no storage whatever."

Closely analogous to the instant case are such illustrations as a coal chute leading from a bin to the tender of an interstate locomotive where the coal on its journey toward the tender passes through an automatic breaker which reduces it to a size suitable for the firebox, or the case of a water pipe leading from a water tank to the tender of an interstate locomotive, where, midway between the tank and the tender, there is an apparatus automatically changing the chemical constituents of the water so as to prevent boiler scale in the boiler of the locomotive—a not unusual treatment of water intended for locomotives.

In neither case just referred to do we think it could be said that the coal chute or the pipe was not an instrumentality of interstate commerce, and in neither case, we respectfully submit, would it make any difference whether a man immediately engaged in the keeping of such coal chute or such pipe in a usable condition so that coal or water *then* on its way to the tender might proceed uninterruptedly, would be held to be within or without the provisions of the Federal Employers' Liability Act according to whether he was between the breaker and the tender in the one case, or the chemical apparatus and the tender in the other case. Nor should it matter in those cases what length the coal chute or the water

pipe might be, provided there was continuous transmission through them from the place of storage to the locomotive. In both cases that necessary to the uninterrupted operation of the interstate locomotive would have already left its storage place, whereas, in the *Harrington* case, the commodity was being put into a storage place.

In the case at bar there was no interruption in the progress of the electrical energy from the time it left the power house to the time it entered the car motors. That it passed through a transforming or reduction station would not break the continuity of its flow, or the necessity of such continuity for the operation of the car motors toward which it was proceeding with the speed of light, or change its status to that of a fuel stored for future use.

We respectfully take issue with the statement in the majority opinion that

> "the main line is not part and parcel of the railroad or its equipment in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives."

It is true that the main power line in the case at bar is not "part and parcel of the railroad," if one limits the term "railroad" to a right of way and cars

running thereon. It is, however, an integral and indispensable part of the equipment of the railroad, and part of an operating unit, just as much as the trolley line, because, without its flow the trolley wire or line could not become energized and without that energy constantly present the motors would not function. If the argument of the majority is carried to its logical conclusion, then in a case like this the trolley line is not a part of the railroad or its equipment, because it is merely "an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied." We respectfully submit that an operating unit cannot be so dislocated or dissected.

Moreover, the case at bar differs essentially from the *Harrington* case, in that it is conceded by the record and by the majority opinion of the Court that if the current passing through the line on which Butler was working at the time of the fatal accident had been so short circuited as to cease its onward journey from the point where it was short circuited, the cars would have stopped. Not so in the *Harrington* case in respect to the coal being switched by him to the bins or chutes where it was stored against a future use which might never be made.

It is conceded by the California Court and by the finding of the Commission that Butler's work "was necessary to keep said main electric lines in a workable and usable condition," the obvious conclusion

being that, if such lines were not kept in a workable and usable condition, the furnishing of the electricity necessary to the operation of the car motors would be materially interfered with, if not stopped, thereby immediately interfering with the interstate commerce which, as conceded by the Court and found by the Commission, was then and there being carried on by those cars.

Nor is the case at bar analogous to the *Shanks* case (*Shanks* vs. *D., L. & W. Ry,* 239 U. S. 556), wherein one engaged in putting up a shafting which was to carry a belt, which in turn would impart power to a machine, which in turn would be used in making repair parts for instrumentalities of interstate commerce was held to be too remote from the interstate commerce then being carried on. In the case at bar, Butler was as closely connected with the interstate commerce then being carried on as he would have been if he had been working in the transforming station, or on the wire between the transforming station and the trolley wire, or on the trolley wire itself, and in the latter case it was held by the California Supreme Court itself in *Southern Pacific Company* vs. *Industrial Accident Commission,* 174 Cal. 19, cited with approval in the majority and minority opinions in this case, that a lineman so engaged on a trolley wire was employed in the commerce then being carried on on the very electric line here considered.

Again, we must respectfully dissent from the concluding language of the majority opinion which paraphrases an expression in the *Harrington* case by saying that Butler was only engaged in "putting the electric power (coal supply) in a convenient place from which it could be taken as required for use."

We respectfully suggest that the majority opinion fails to differentiate between the storage of fuel of potential energy and the direct transmission of kinetic energy in an uninterrupted journey from the place where it is generated to the place where it is changed from electrical energy to mechanical energy, namely the car motor.

It is respectfully submitted that inasmuch as the electric line on which decedent was working was, then and there, an instrumentality of interstate commerce, he was "keeping in usable condition" such instrument (*Shanks* case, 239 U. S. 556), and was engaged in keeping such instrumentality "in a proper state of repair while used in interstate commerce, which service is so closely related to said commerce as to be, in practice and in legal contemplation, a part of it." (*Pedersen* case, 229 U. S. 146.)

In the commission's award, it drew the legal conclusion from the admitted facts that Butler's work was, as it said, only "preliminary" to interstate commerce. The majority opinion concedes that this was not an altogether proper term, but states that it was

used to express the idea that the work in which Butler was engaged was not so closely related to interstate commerce as to be a part of it. If the commission's finding, which is a pure conclusion of law that the work was only preliminary to interstate commerce, is to fall, as we respectfully submit that it should, then the entire award falls with it and the Supreme Court of California should have annulled the award instead of affirming it.

The word "preliminary" finds no place in the federal decisions under which alone the claimant's rights and the jurisdiction of the commission to make an award are to be adjudged.

The work of the switchman in the *Parker* case (*L. & N. Ry. Co.* vs. *Parker,* 242 U. S. 13), was only "preliminary" to the reaching and movement of an interstate car.

So also in the *Seale* case (*St. Louis, S. F. & T. R. Co.* vs. *Seale,* 229 U. S. 156), the work of the deceased yard clerk was only "preliminary" to the breaking up of the partly interstate train he had not even reached when he was killed.

"Preliminary" to interstate freight proceeding on its way was the work of the brakeman in the *Carr* case (*N. Y. Central & H. R. Co.* vs. *Carr,* 238 U. S. 260), injured while setting out an interstate car on a siding.

And the fireman (*N. Car. R. Co.* vs. *Zachary,* 232 U. S. 248) who was killed while temporarily going away from an engine he had freshly oiled and fired for an interstate trip, but was shortly to rejoin, had only in such oiling and firing been engaged in work "preliminary" to actual transportation service interstate.

Yet in these cases as in all others where the Federal jurisdiction has been considered by Federal Courts the test applied was not the indefinite and inexpressive word "preliminary," but—as said in the *Carr* case, *supra*—was the injured employee "engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof," or, as said in the *Parker* case, *supra,* was the act being done "for the purpose of furthering the later work" (interstate commerce).

In conclusion, it is respectfully submitted that the Supreme Court of California was in error in depriving your petitioner of its defense under the Federal Employers' Liability Act, because in so doing it misconstrued and misapplied the decisions of this Court, and failed to observe, as said in Mr. Justice Wilbur's dissenting opinion, that

> "the instant the potential energy was converted into kinetic energy it became the proximate cause of train movement, and the instrumentalities used in applying it to the interstate com-

merce are as much a part of the system of transportation as the car in which the passenger or freight rides."

It is therefore respectfully submitted that on the certified record, the Supreme Court of the State of California should be directed to annul the award made by the Industrial Accident Commission.

Respectfully submitted,

HENLEY C. BOOTH,

Attorney for Petitioner.

WM. F. HERRIN,

Of Counsel.

COPY OF OPINION AND ORDER OF SUPREME COURT OF CALIFORNIA HERE SOUGHT TO BE REVIEWED

S. F. No. 8583. In Bank. March 25, 1918.

SOUTHERN PACIFIC COMPANY, *Petitioner*, v. INDUSTRIAL ACCIDENT COMMISSION, *et al., Respondents.*

Petition for writ of review prayed for against the Industrial Accident Commission of the State of California.

The Industrial Accident Commission made an award in favor of the dependents of William T. Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda county, its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substations the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars.

When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations.

This writ of review was issued to test the validity of the employer's claim that the commission was

without jurisdiction to make an award, for the reason that Butler was engaged in interstate commerce, within the purview of the act of Congress of April 22, 1908. In its findings the commission, after setting forth in some detail the circumstances surrounding the employee's injury, declares "that while said employee was working as aforesaid between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric cars, and he was employed in work preliminary to the running of said electric cars, and that, therefore, he was not employed in interstate commerce."

Upon the question whether a given employment falls with the scope of the federal act we must look to the decisions of the Courts of the United States as of controlling force. In *Shanks* v. *Del., L. & W. R. R. Co.* (239 U. S. 556), the Court said: "The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" The commission was, no doubt, seeking to apply this test, and we take it that the word "preliminary," though perhaps not an altogether appropriate term, was used by it in its finding to express the idea that the work in which Butler was engaged was not so closely related to interstate transportation as to be a part of it.

The opinion in the Shanks case refers to a number of earlier cases in which, upon varying facts, the federal statute had been held to be applicable or inapplicable. Upon examination of these decisions, it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation. In

this Court it has been held that a mechanic engaged in repairing a switch engine which was used in the transportation of commerce, interstate and intrastate, was engaged in interstate commerce within the meaning of the act. (*Southern Pac. Co.* v. *Pillsbury*, 170 Cal. 782); that a watchman on a main steam line was engaged in interstate commerce (*Southern Pac. Co.* v. *Industrial Acc. Com.*, 174 Cal. 8); as was a lineman who was removing a telephone wire which had fallen on the trolley wire of the same lines involved in this proceeding. (*Southern Pac. Co.* v. *Industrial Acc. Com.*, 174 Cal. 19.)

In *C. B. & Q. R. R. Co.* v. *Harrington* (241 U. S. 177), the Supreme Court of the United States had occasion to consider a state of facts more closely analogous to the situation here presented. The injured employee was a member of a switching crew which was engaged in switching cars of coal belonging to the railroad company. The coal was being switched to a shed, where it was to be placed in bins and chutes, and supplied as needed to locomotives engaged in interstate as well as intrastate transportation. It was held that the Federal Employers' Liability Act was not applicable. Applying the test laid down in the Shanks case, the Court said that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use." [1] The reasoning is apt here. The coal was essential to the production of motive power for the locomotives, just as, in this case, the electric current was necessary to move petitioner's cars. But in moving the coal to the shed, Harrington was engaged in a work which was at least one step removed from the actual furnishing of the coal to the engines, and this precluded that close relation of his work to interstate commerce

which would bring him within the scope of the federal act. So, in this case, Butler was working on the part of the line between the main power house and a substation. The current was still to pass through the transformers and converters, and be so converted and reduced as to be suitable for use in propelling the cars. The test of remoteness seems as applicable in the one case as in the other. It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current at any point, however remote from the lines of track, would immediately stop the progress of all cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says, "the federal act speaks of interstate commerce in a practical sense suited to the occasion." (*Shanks* v. *Del., Lack. & West. R. R., supra; C. B. & Q. R. R.* v. *Harrington, supra.*) Viewing the question before us in this light, we think the answer to it should be the same as that given in the Harrington case. The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting on to the trolley line the necessary power to be used by the operatives of the road as desired—

or, to paraphrase the language already quoted from the Harrington case, "putting the electric power [coal supply] in a convenient place from which it could be taken as required for use."

We think, therefore, that the commission was justified in exercising jurisdiction.

The award is affirmed.

SLOSS, J.

We concur:
ANGELLOTTI, C. J.
VICTOR E. SHAW, J., *pro tem.*
RICHARDS, J., *pro tem.*

DISSENTING OPINION.

I dissent.

The test is stated by the Supreme Court of the United States to be "was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" The deceased was engaged in working upon an insulator that supported a wire that was actually in use in moving trains engaged in interstate commerce, and was killed by a fall resulting from a shock caused by an escape of some of the electric current so used. His connection with the actual movements of trains was so direct that had all the current short-circuited through his body its effect on the trains in motion would have been instantaneous.

The electricity in question was generated at a steam generating plant at Fruitvale. That steam plant was just as truly operating the moving cars, as though the steam had been generated in a locomotive attached to the train. The electric transmission line was merely a means of conducting that power to the train and in no sense differs in legal contemplation from the system of transmission of power by cable to the cars of a cable railroad. It is merely a means to an end; an instrumentality for

moving interstate commerce; a method of applying the potential energy of coal and fuel oil to the movement of a train. The instant the potential energy was converted into kinetic energy it became the proximate cause of train movement, and the instrumentalities used in applying it to the interstate commerce are as much a part of the system of transportation as the car in which the passenger or freight rides. The intimate connection with the actual movement of trains is shown by the fact that the instant the power plant ceases to operate, or the transmission wire breaks, the car upon the railroad track, whether it be ten miles or five hundred miles away, immediately stops. The fact that in transmitting this power, it passes through what is known as transforming stations has no significance whatever. It must be conceded that distance is not a factor in the determination of the question whether or not a person is engaged in interstate commerce. For instance, no one would doubt that if a train despatcher on Eiffel Tower, Paris, operated trains on an interstate railroad in California from there, he would be engaged in interstate commerce. The question of the method of the transmission of his orders would likewise be immaterial. He might use wireless across the Atlantic ocean, a telegraph wire from New York to San Francisco, and a telephone from San Francisco to the station agent, who writes the message and hands it to the conductor. It would make no difference if the message was originally written and transmitted in French and was afterwards translated into English. It is obvious that the true question is, "Were the messages that were sent by the train despatcher obeyed by the train crews in operating their trains?" So the question here is, "Was the power passing along the power line the proximate cause of the motion of the trains?" If so, those engaged in operating or maintaining the devices by which the power is transmitted would, upon the principle above stated, be engaged in interstate commerce. That this power so transmitted was the prox-

imate cause of the movement of the trains would seem to be conclusively answered in the affirmative by the fact that any break in the power line instantaneously affects the moving trains. The transforming stations referred to in the majority opinion are merely a means to an end, viz., the transmission of the power from the steam plant to the train. The fireman in the generating plant is as truly engaged in moving interstate commerce as is the fireman of a locomotive hauling such commerce. In each case the fireman is putting into the firebox potential energy in the form of coal or oil. That energy before it is applied to the cars must first be converted into heat, a form of kinetic energy, and then from heat into train motion. The fact is that both are actually engaged in moving the train by the process of converting the potential energy stored in coal or oil into the movement of a train. If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy, and then used out of the storage batteries, as in the case of an electric automobile, the situation might be analogous to that referred to in *C. B. & Q. R. R.* v. *Harrington*, 241 U. S. 177, but under the agreed facts there is no storage whatever. This case cannot be distinguished in principle from the case of *Southern Pacific Co.* v. *Industrial Accident Comm.*, 174 Cal. 8, where a lineman was killed while engaged in removing a telephone wire which had fallen on a "trolley wire of the same line involved in this proceeding." The power transmission line was but an extension of the trolley wire, as much a part of the system as feed wires along the track, or the span wires supporting the trolley wires.

WILBUR, J.

I concur:
MELVIN, J.

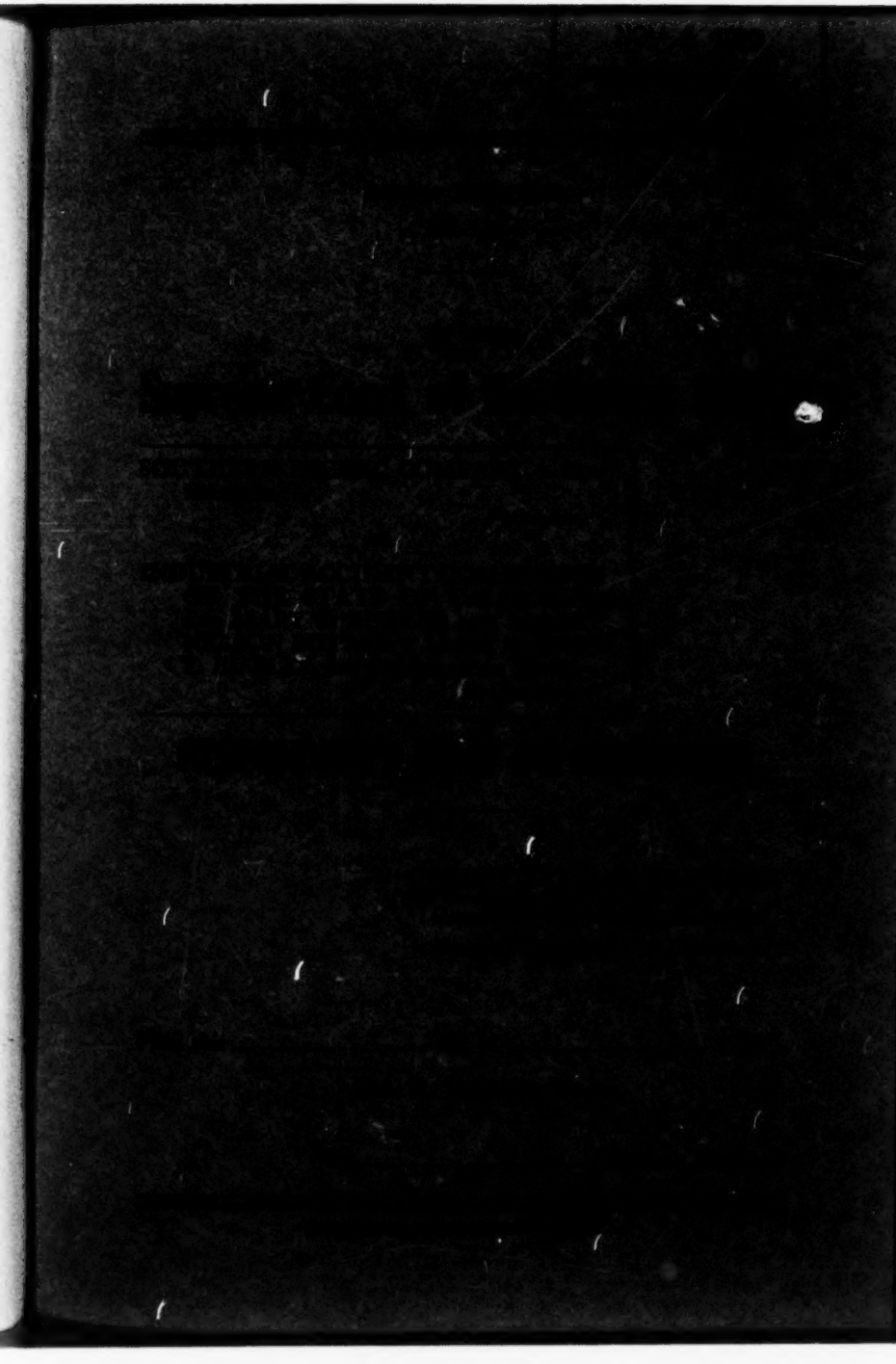

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TABLE OF CASES AND CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 118.

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by Mary E. Butler, his Guardian ad litem,

Respondents.

RESPONDENT'S BRIEF ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

This is a proceeding in certiorari to review a decision of the Supreme Court of California affirming an award of the Industrial Accident Commission of California. The latter body awarded a death benefit

under the California Workmen's Compensation, Insurance and Safety Act (chapter 176, California Laws, 1913) to Mrs. Mary E. Butler because of the electrocution of her husband, William T. Butler, while in the employment of petitioner, Southern Pacific Company, on June 21, 1917. The Southern Pacific Company, which is a railroad company engaged in both interstate and intrastate commerce, has claimed throughout the entire proceeding below, and now claims, that Butler's death occurred while he was performing service in interstate commerce and that therefore the California Workmen's Compensation Act is excluded from application by the Federal Employers' Liability Act, 35 United States Statutes at Large 65, chapter 149. The California Industrial Accident Commission and the California Supreme Court held that at the time of his death, Butler was not so engaged in interstate commerce. The only question here raised, outside of a procedural point, is whether Butler was engaged in interstate commerce at the time of his injury.

FURTHER STATEMENT OF FACTS.

The facts have been accurately stated by petitioner. To simplify them and present a concise statement of bare facts upon which this issue turns, the following is quoted from the opening paragraph of the majority opinion of the Supreme Court of California in this case:

> "The Industrial Accident Commission made an award in favor of the dependents of William T.

Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda County, its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substations the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars.

When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations." *Southern Pacific Co.* vs. *Industrial Accident Commission,* 178 Cal. —, 171 Pac. 1071 (record p. 68).

The electric cars in question are wholly confined to a local run within the State of California. Such cars, however, to a small extent occasionally carry passengers, baggage or freight bound to or from other states.

ARGUMENT.

I.

Certiorari Is Not the Proper Remedy and this Proceeding Should Therefore Be Dismissed.

The attention of the court is respectfully called to the fact that the decision of the State Supreme

Court in this case was adverse to the federal privilege or right asserted by petitioner.

Under Section 237 of the Judicial Code of the United States and the corresponding section of the prior Judiciary Act, the decision of the highest court of the state in which a decision may be had, adverse to the asserted federal right of privilege, may be brought to this court by *writ of error,* which is the only procedure authorized by these statutes.

By a statutory amendment enacted in 1916 the jurisdiction of this court was extended to review *by certiorari or otherwise,* a decision of the highest court of the state in which a decision might be had *in favor* of the federal claim and against the constitutionality of the state statutes in question. This amendment constitutes the only statutory authority for certiorari to the highest court of a state, and obviously does not include the present case, as the present decision is *adverse* to the asserted federal right or privilege. Furthermore, the amendment of 1916 does not in any way repeal or alter the provisions of section 237 Judiciary Code, above referred to, making a writ of error the only remedy in cases like the present.

It is therefore respectfully submitted that *certiorari* does not lie in this case and that this proceeding should therefore be dismissed.

II.

Butler Was Not Engaged in Interstate Commerce at the Time of His Injury.

A. In General.

It is required by the Federal Employers' Liability Act that the employee must *at the moment of the injury* be engaged in interstate commerce.

Sec. 1, act April 22, 1908, 35 U. S. Stats. at L. 65, ch. 149.

This court has also laid down the following tests:

"As we have pointed out, the federal act speaks of interstate commerce in a practical sense suited to the occasion and the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate *transportation* or in work so closely related to it as to be practically a part of it. *Shanks* vs. *Delaware, Lakawanna & Western R. R.*, 239 U. S. 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it would be taken as required for use." *Chicago, Burlington & Quincy R. Co.* vs. *Harrington*, 241 U. S. 177. (Italics ours.)

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in

a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* vs. *United States,* 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, *was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.* * * *" "Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a road bed, bridge, engine, car or other instrument *then in use in such transportation.* What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act." *Shanks* vs. *Del., Lack. & W. R. Co.,* 239 U. S. 556. (Italics ours.)

It has accordingly been held that injuries sustained by a railroad employee while repairing a car or locomotive then in use in interstate commerce are within the federal act. (*Walsh* vs. *N. Y., N. H. & H. R. R. Co.,* 223 U. S. 1.) But injuries sustained

while caring for machinery or shops used in the repair of such car or locomotives are not within the federal act. *Cousins* vs. *Illinois Central Railroad Co.*, 241 U. S. 641, reversing same title, 126 Minn. 172, 148 N. W. 58; *Shanks* vs. *Del., Lack. & W. R. R. Co.*, 239 U. S. 556, reversing same title, 214 N. Y. 413; *Barlow* vs. *Lehigh Valley R. Co.*, 244 U. S. 183, reversing same title, 214 N. Y. 116.

And injuries sustained while the employee is repairing cars or locomotives used indiscriminately in interstate and intrastate commerce, while such rolling stock is out of service for repairs, are not services in interstate commerce. *The Minneapolis & St. L. R. R. Co.* vs. *Winters*, 242 U. S. 353; *Baltimore & O. R. Co.* vs. *Branson*, 242 U. S. 623, reversing same title, 128 Maryland 678.

It has also been held that the repair of tracks, tunnels or bridges then in use for interstate and intrastate commerce comes within the federal act. *Pedersen* vs. *Del., Lack. & W. R. R. Co.*, 229 U. S. 146, while the construction of a new track, tunnel or bridge, prior to its being opened for interstate commerce, does not fall within the federal act even though it is to be definitely devoted to interstate commerce when opened for use. *Pedersen* vs. *Del., Lack. & W. R. R. Co.*, 229 U. S. 146, *dictum; New York Central R. R. Co.* vs. *White*, 243 U. S. 188; *Minneapolis & St. L. R. Co.* vs. *Nash*, 242 U. S. 619; *Raymond* vs. *C. M. & St. P. R.* Co., 243 U. S. 43.

It has similarly been held that the coaling of an interstate locomotive is within the federal act. *Armbruster* vs. *Chicago, R. I. & P. R. Co.* (Iowa), 147 N. W. 337; *Southern R. Co.* vs. *Peters* (Alabama), 69 So. 611. But the mining of coal in the railroad company's mine or its transportation within the state to chutes from which it is to be loaded upon interstate locomotives does not come within the federal act. *Del., Lack. & W. R. R. Co.* vs. *Yurkonis*, 238 U. S. 439; *Chicago, Burlington & Quincy R. R. Co.* vs. *Harrington*, 241 U. S. 177; *Barlow* vs. *Lehigh Valley R. Co.*, 244 U. S. 183; *Zavitovsky* vs. *Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974.

The general line of demarcation appears to be that the service must be directly connected with the interstate transportation and not preliminary to the movement of interstate commerce. Stated in another way, the service must be proximately and immediately connected with interstate commerce and not remotely. In applying the test of remoteness the attention of the court is respectfully called to the language used by it in the citations given above in the *Shanks* vs. *Del., Lack. & W. R. R. Co.* and *Chicago, Burlington & Quincy R. R. Co.* vs. *Harrington* cases.

B. Importance of the Service Immaterial.

The importance of the service in connection with interstate commerce, even the fact that interstate commerce can not proceed without it, is immaterial. In the above cases, interstate commerce can not be

carried on unless repair shops are maintained to repair rolling stock, unless tracks, bridges, tunnels and equipment are constructed, and unless coal, fuel oil or other sources of power be maintained and supplied to locomotives. The test is the *nearness* of the service to the actual movement of interstate commerce, not the *importance* of the service.

C. The Service Rendered by Butler at the Time of His Death Was Remote to Interstate Commerce.

Butler was not killed while *operating* a train engaged in interstate commerce. He was not killed while *repairing* trolley wires over the tracks upon which the electric trains were run. He was not even killed while *repairing* broken power wires or generating machinery at a point remote from these tracks. He was, instead, killed while wiping insulators at a point distant from the tracks and situated between the power plant at which a high voltage alternating current was produced and a substation at which the alternating current was to be changed to a low voltage direct current for distribution to the trolley wires and thence to the trains.

The steps in the generation of the power by which the Southern Pacific Company's electric trains in question are moved is as follows:

1. Coal is mined, or fuel oil pumped from wells, and such fuel is transported to the Southern Pacific Company's generating plant at Fruitvale.

2. At the Fruitvale generating plant the fuel is converted into steam power, which by the operation of steam engines and electric dynamos is again converted into a high voltage alternating electric current.

3. This high voltage alternating current is carried on main power lines to substations at which its pressure or character is processed or changed from the high voltage alternating current to a low voltage direct current.

4. From the substations the power is distributed by wires to the trolley wires above the tracks of the company.

5. The power is taken from the trolley wires by the trolleys of the Southern Pacific Company's railroad trains and thus moves the trains through the instrumentality of motors carried under the cars.

It is manifest from the foregoing that there must be some point between the actual movement of interstate and intrastate commodities on electric cars and the extraction of fuel from the earth, assuming the railroad company to own the mines or oil wells, at which the service rendered by employees ceases to directly facilitate the movement of interstate commerce and becomes remote. That such remote service may be vitally important or essential, is, as shown above, immaterial, if the service be a step or steps removed from the actual movement of interstate commerce. It is difficult to place the point where remoteness commences with exactness. Without attempting to do so, it seems clear that that point

had been reached prior to the point at which Butler was performing service. His services were incidental to the third stage mentioned above. At that time the motive power or potential power was still of a different character and form from that required by the trains for operation, and had not yet been delivered to the tracks upon which such trains were operated.

An added consideration establishing remoteness from interstate commerce lies in the fact that deceased at the time of his injury was not directly facilitating the transmission of power. He was not repairing a break in the transmission line, for instance. He was not assisting in the generation of power, as for instance, by firing boilers or running steam engines used in generating power. He was instead merely dusting or wiping off an instrumentality used in the transmission of power, his acts not involving the interruption or repair of interruption of the transmission system. Compared with the facts of the *Harrington* case mentioned in the next paragraph, Butler was not in a position analogous to that of an employee coaling a locomotive or even transporting coal to the bunkers from which it was placed in locomotives. He was, instead, in a position analogous to that of a person cleaning, without interruption of use, a car bunker or coal chute through which coal passed on its way to interstate locomotives.

D. The Facts of the Present Case Are Squarely in Line With the Decisions of This Court in Chicago, Burlington & Quincy R. R. Co. *vs.* Harrington, 241 U. S. 177, and Delaware, Lackawanna & Western R. R. Co. *vs.* Yurkonis, 238 U. S. 439.

It will not be helpful to the court to review the hundreds of cases decided by federal and state courts dealing with the perplexing question of whether the facts of the concrete case bring it within interstate or intrastate commerce. Eliminating, therefore, a large number of authorities of moderately close application, respondents submit that the present case is on all fours with the *Harrington* and *Yurkonis* cases, *supra*.

In the *Harrington* case, the railroad employee was moving coal "to the coal chute where it was to be placed in bins and chutes and supplied as needed to locomotives of all classes." The only ground for invoking the federal act was that the coal so placed was to be used in interstate hauls. Harrington's service was in bringing potential power to a point where it would subsequently be taken up as needed and used for moving interstate and intrastate commerce.

In the *Yurkonis* case, the employee was mining coal at the railroad company's mine, which coal was subsequently to be used to fire the company's engines operating in the same state but moving both interstate and intrastate commerce.

In both cases the service was held to be remote to interstate commerce, although the latter could not be carried on without it.

In the present case, Butler was engaged in cleaning and caring for instrumentalities by which electric power was carried from the place where it was originally produced to substations in which it was to be altered in form and again taken to points where it could be supplied, as needed, to cars moving commerce of both classes. The only ground for invoking the federal act is that the power was subsequently to be used for local hauls in part involving interstate commerce. The subsequent destination or use of the power is equally remote in all three cases. In all three, the employee was occupied with the transmission of potential power at a point prior to its delivery to the locomotives, prior to its being placed alongside the tracks convenient for such delivery.

The present case is even stronger than the two cited. If, in the *Yurkonis* case, the service of the employee was rendered prior to the screening or breaking of the coal, or if in the *Harrington* case, the services were rendered prior to the breaking of coal in its final size for use in the locomotives, or prior to the extraction of some by-product valuable for some other purpose and not essential to locomotive firing, these two cases would be even stronger upon their facts. To illustrate further, in many western states, crude oil is burned for locomotive fuel instead of coal. If in such states the crude oil

be processed by the removal of ingredients more valuable for other purposes than for locomotive fuel, such as gasoline, asphaltum or toluol (the base of trinitrotoluol, TNT), the case of a railroad employee injured while transporting oil in an intrastate haul prior to such processing but eventually destined for use in locomotives moving interstate and intrastate commerce, would more clearly be one of intrastate commerce than the *Harrington* case. In the present case, Butler's service was performed at a point prior to the altering of the electric current to its final form for use in petitioner's trains.

E. Differences in Nature Between Coal and Electricity Legally Unimportant.

The only ground upon which petitioner seeks to differentiate the two cases cited above from the present case is that electricity in its nature moves more rapidly than the potential power contained in coal. Petitioner argues that a break in the electric line at the point where Butler was killed might immediately stop the running of all local electric trains. It is respectfully submitted that this difference in nature in electricity and coal is not a differentiation having legal importance.

In support of this determination we respectfully urge the following considerations:

(1) *The difference is in degree only, not in principle.*

Many forms of power have greater mobility than coal. Gasoline, for instance, is transported more

speedily, but if the Southern Pacific local trains were operated by gasoline motors built into cars no ground for differentiation with the *Harrington* case would exist. And yet the stoppage of supply of gasoline could as easily paralyze commerce.

Still more rapidly, compressed air is frequently used as a source of power. In such case the air is compressed in a compressor plant and reservoirs carried on locomotives are refilled from time to time from pipes leading from the plant. Could it be contended that an injury sustained by an employee while wiping air pipes in the plant would involve a differentiation from the *Harrington* case?

Still more closely in degree, electric locomotives on some lines are operated by storage batteries instead of taking power from trolley wires. If it be assumed that an electric plant be maintained for the purpose of recharging storage batteries in locomotives, and that an employee is injured while wiping insulators in the recharging plant, would such situation involve any differentiation in principle from the *Harrington* case?

The only logical line of demarcation to be drawn is between the services *directly* connected with the movement of commodities, and services which are useful in the operation of the railroad at some point preliminary to the actual movement of commerce. The difference in nature between coal, fuel oil, compressed air, electricity via storage battery and electricity via power house, affords no differentiation having a legal effect.

(2) *Essentially the difference of rapidity in movement between coal and electricity becomes, upon final analysis, a mere difference in reserves maintained, which is not a difference in nature at all.*

A prudent coal burning railroad will provide storage reserves of coal against possible shortage. Similarly, a prudent electric railway will provide reserves of electric power by storage batteries to provide against possible failure for a short time, of electricity from the usual source of generation. When either reserve is exhausted, unless the supply be restored, the road is at a standstill. Since the possibility of interruption of coal supply did not in the *Harrington* and *Yurkonis* cases cause the act of the employee to become one of interstate commerce, it would follow that the possibility of interruption of the principal source of electric power in the present case would not affect the legal character of Butler's service, as reserves can be maintained under either system to obviate immediate stoppage. The record does not disclose whether the Southern Pacific did or did not maintain a storage battery system or did or did not maintain a reserve power house in case of failure of its ordinary supply of electricity. This court can take judicial knowledge, however, of the fact that in general, electric railways may and frequently do protect themselves against cessation of power by the use of storage batteries. If the speed with which traffic will be stopped upon cessation of the usual source of power be the test, then an electric railroad with a large storage battery system would

be nearer the *Harrington* decision than a coal burning railroad itself, with a small reserve of coal. The fact that both systems are capable of maintaining reserves of power, therefore, eliminates any difference in nature between the two with reference to sudden stoppage of service.

F. Other Authorities.

Without discussing any other authority at length, the following decisions are briefly submitted to the attention of this court, being of the same nature as the *Harrington* and *Yurkonis* cases, *supra:*

In *Barlow* vs. *Lehigh Valley R. Co.*, 244 U. S. 183, reversing same title, 214 N. Y. 116, this court held that the putting of coal cars on a trestle from which the coal was to be dumped into pockets and thence loaded into locomotives moving interstate and intrastate commerce, was not a service in interstate commerce.

In *Barker* vs. *Kansas City* [illegible] *O. R. Co.* (Kans.), 146 Pac. 358, it was held that the hauling of cars of coal, all within the state, was not made a service in interstate commerce by reason of the fact that the coal was to be used later upon locomotives engaged in interstate and intrastate commerce.

In *Giovio* vs. *New York Central R. Co.* (N. Y.), 162 N. Y. S. 1026, compensation was allowed under the state law where an employee was killed while alighting from a switch engine he had just finished coaling, the switch engine being engaged indiscriminately in interstate and intrastate commerce.

In *Zavitovsky* vs. *Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974, 14 N. C. C. A. 1004*n*, the state statute was applied where the employee was cleaning up coal from a basement where the coal had fallen from conveyors running through the room on its way to hoppers, from which it was to be supplied to engines used indiscriminately in interstate and intrastate commerce. The court said in part as follows:

> "It is much the same with the evidence tracing the coal cleanings from the floor to the tender of locomotive engines which, by stipulation, were engaged in interstate commerce. The coal was not fed from the bin where the conveyor left it into these locomotive tenders. The evidence indicates that it had to be weighed out from these bins, and also indicates that it then went into another bin from which it was spouted into the tenders, *so that there must have been one or two men or crews of men between the deceased and the supplied locomotives,* as well as between the deceased and the coal pile on the dock. The deceased may have taken part in the last delivery into the tenders of the interstate locomotives, but that is not shown. It is shown that the coal in the pile on or near the dock had passed out of interstate commerce and the one ground upon which it could be claimed that the deceased was engaged in interstate commerce is that he was engaged in the performance of one step in the transmission of this coal from the pile to the interstate locomotives for use in the latter as fuel. In cleaning up the floor the deceased was not engaged directly in

interstate commerce. His purpose and that of his employer was to clean up the floor, and there was no place to put the coal cleaned up except on the going conveyors and the fact that it, with other coal, and the aid of other agencies intervening between the deceased and the interstate locomotive, finally reached the latter, was merely incidental. * * *." (Italics ours.)

In *Gallagher* vs. *New York Central R. Co.*, 167 N. Y. S. 480, it was held that a carpenter engaged in repairing coal chutes through which coal passed to interstate locomotives, was not engaged in interstate commerce.

The decision in the case last cited was predicated upon the authority of *Kelly* vs. *Penn. R. Co.*, 238 Fed. 95, 151 C. C. A. 171, in which a carpenter, injured while directing the movement of a car of lumber to a similar chute, to be used in its repair, was held not to have been engaged in interstate commerce.

SUMMARY.

It is therefore respectfully submitted that decision should be for respondents in this proceeding upon the following grounds:

1. That petitioner has chosen the wrong remedy, his only remedy being by writ of error.

2. The deceased employee was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, under the facts of the

present case and the decisions of this court in *Chicago, Burlington & Quincy R. R. Co.* vs. *Harrington*, 241 U. S. 177, and *Delaware, Lackawanna & Western R. R. Co.* vs. *Yurkonis*, 238 U. S. 439, and other decisions cited above.

Respectfully submitted.

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OCTOBER TERM, 1919

No. 118.

Supreme Court of the United States

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and MARY E. BUTLER and ALBERT NELSON BUTLER, a Minor, by MARY E. BUTLER, His Guardian *Ad Litem,*

Respondents.

PETITIONER'S REPLY BRIEF

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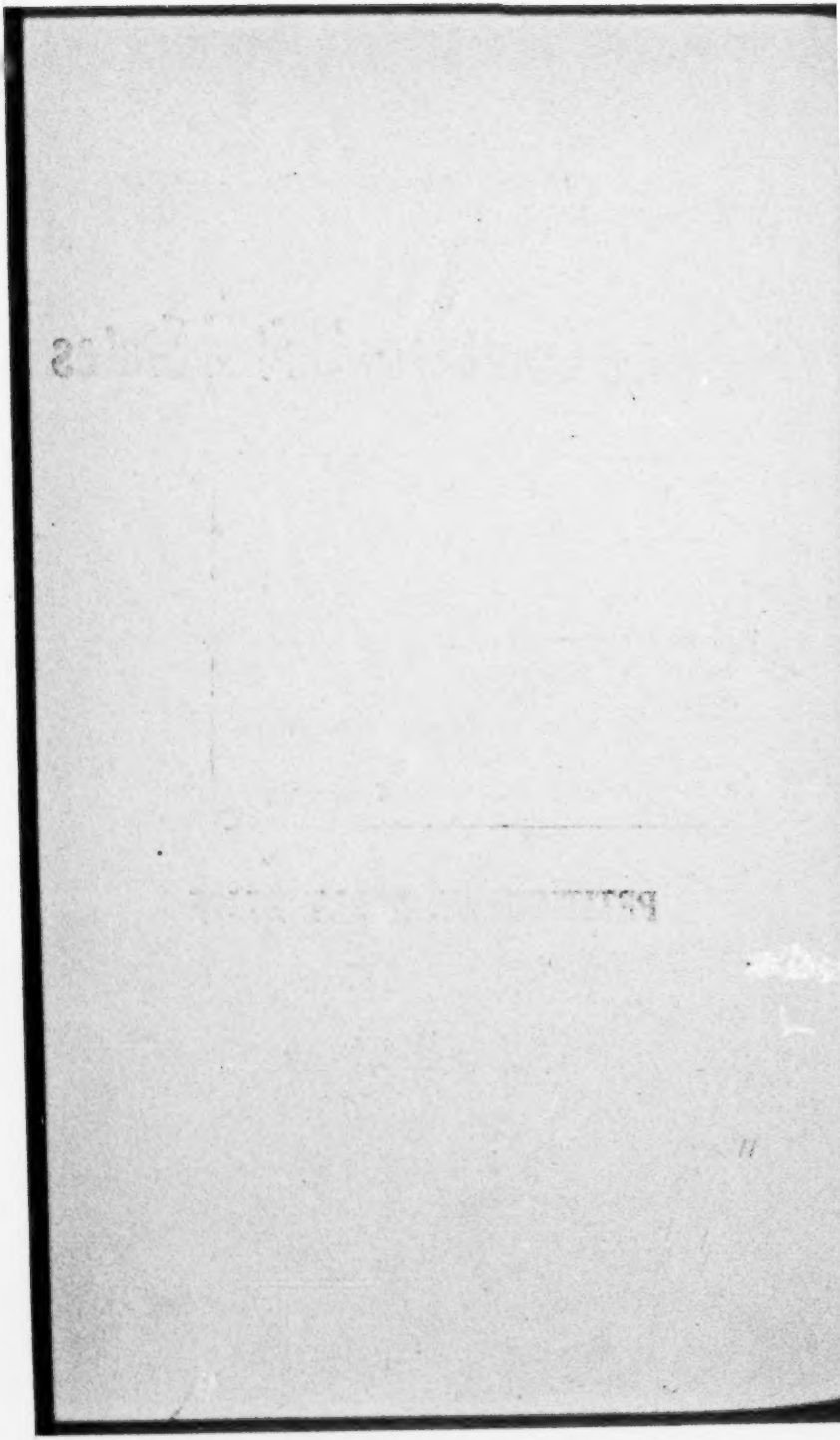

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PETITIONER'S REPLY BRIEF.

POINTS IN REPLY.

I.

The Writ of Certiorari was properly granted herein under Section 237 Judicial Code, as amended September 6, 1916, Chapter 448, 39 Statutes 726.

II.

The instant case falls under the Federal Employers' Liability Act because deceased was "doing the act for the purpose of furthering" the work of interstate commerce (Parker case, 242 U. S. 13-14) and was engaged in "keeping in usable condition * * * an instrument then in use in such interstate transportation" (Shanks case, 239 U. S. 556-560)

and was keeping "instrumentalities in a proper state of repair while used in interstate commerce, which service is so closely related to such commerce as to be in practice and legal contemplation a part of it." (Pedersen case, 229 U. S. 149-151.)

III.

The decision here reviewed should be annulled.

BRIEF OF THE ARGUMENT.

I.

The Writ of Certiorari was properly granted under Section 237 Judicial Code, as amended September 6, 1916 (Chapter 448, 39 Statutes 726).

Counsel for respondents contend that error and not certiorari is petitioner's sole remedy. (Respondents' Brief, p. 3.)

They are incorrect in their application of the record to the Federal statutes.

William T. Butler, husband of Mary E. Butler, one of the respondents herein, was killed June 21, 1917, at Oakland, California, while employed by petitioner, Southern Pacific Company, as an electric lineman. (Printed Record p. 3, Marginal p. 7.)

After an award against Southern Pacific Company by the California Industrial Accident Commission, Southern Pacific Company applied for and secured from the California Supreme Court a Writ of Review, which is the only method by which that Court may review the Commission's awards. That Court affirmed the award by a divided court (opinion of California Supreme Court, Printed Record p. 68, Marginal p. 111). The Court says:

> "This Writ of Review was issued to test the validity of the employer's claim that the Commission was without jurisdiction to make an

> award for the reason that Butler was engaged in interstate commerce within the purview of the Act of Congress of April 22, 1908."

That, as more fully appears by the Court's opinion, was the only question considered by the Court as well as the only issue before the Commission.

The California Industrial Accident Commission derives its powers from the Workmen's Compensation Insurance and Safety Act of the State of California *(California Laws of* 1913, *Chapter* 176*)*, which at the time of the accident and the hearing before the Commission, had been amended only by *Chapter* 607, *California Laws of* 1915, and *Chapter* 586, *California Laws of* 1917.

It is an insurance act, generally imposing liability on the employer irrespective of fault or negligence by employer or employe, on the basis of the employe's average earnings.

The act provides (Section 69):

> "(c) This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

It is apparent, therefore, that the petitioner herein does not draw into question "the validity of a statute of * * * any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States" (237 *Judicial Code as amended* 1916). The validity of the statute is conceded, but the claim is made that under the express provisions of the statute the widow's remedy was solely under the Federal Employers' Liability Act.

It is quite clear, we respectfully submit, that the petitioner does not draw into question "an *authority* exercised under any state," on the ground of repugnancy to the Constitution or laws of the United States. We do not claim that the California court and Commission had no authority to hear. It is the result of their determination that we assail on a Federal ground.

What the petitioner did before the Industrial Accident Commission and the California Supreme Court was to claim a "right, privilege or immunity" under the Federal Employers' Liability statute, and the decision of the California Supreme Court finding against the validity of that claim is, we respectfully submit, now reviewable by this Court only on certiorari.

The following authorities, all of which are subsequent to the amendment of 1916 to Section 237 of the Judicial Code, are in point:

In *Philadelphia & Reading Coal & Iron Co.* vs. *Gilbert,* 245 U. S. 162, the validity of service of summons and the power of the state court consistent with the first paragraph of the Fourteenth Amendment to compel the defendant to respond thereto, was challenged in and denied by the New York Court the judgment of which was sought to be reviewed upon a writ of error. It is said by this court, after quoting the amendment of 1916 to *Section* 237 *Judicial Code:*

> "All that was drawn in question by the motion was the validity of the service and the power of the court, consistently with the first section of the Fourteenth Amendment—probably meaning the due process of law clause, to proceed upon that service to a hearing and determination of the case. It did not question the validity of any treaty or statute of, or authority exercised under, the United States. Neither did it challenge the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Challenging the power of the Court to proceed to a decision of the merits did not draw in question an authority exercised under the State, for, as this Court has said, the power to hear and determine cases is not the kind of authority to which the statute refers. *Bethell* vs. *Demaret,* 10 Wall. 537, 540; *French* vs. *Taylor,* 199 U. S. 274, 277.
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> "It follows that the judgment cannot be reviewed upon writ of error. If a review was desired it should have been sought under that clause of the certiorari provision which reads,

'or where any title, right, privilege, or immunity is claimed under the Constitution,' etc. Writ of Error Dismissed."

The *Gilbert* case just referred to was approved by this Court in *Stadleman et al.* vs. *Miner et al.*, 246 U. S. 544, wherein it is said: "And challenging the power of the Court to proceed to a decision did not draw in question the validity of any *authority* exercised under the *State.*" (Italics ours.)

In support of the propriety of certiorari herein are *Cave* vs. *State of Missouri*, 246 U. S. 650, and *Northern Pacific Railway* vs. *Solum*, 247 U. S. 477-481.

In *Ireland* vs. *Woods*, 246 U. S. 323-330, it is held:

> "There is a difference between a question of power to pass a law and its construction, and a difference between the endowing of an officer with authority and his erroneous exercise of that authority. As was said by Chief Justice Fuller, speaking for the Court in *United States* vs. *Lynch*, 137 U. S. 280, 285: 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.'"

II.

The instant case falls under the Federal Employers' Liability Act because deceased was "doing the act for the purpose of furthering" the work of interstate commerce (Parker case, 242 U. S. 13-14) and was engaged in "keeping in usable condition * * * an instrument then in use in such interstate transportation" (Shanks case, 239 U. S. 556-560) and was keeping "instrumentalities in a proper state of repair while used in interstate commerce, which service is so closely related to such commerce as to be in practice and legal contemplation a part of it." (Pedersen case, 229 U. S. 149-151.)

It is now well established, as argued by respondents, that in determining whether a given case falls under the Federal Employers' Liability Act it is not sufficient merely to show that the employer was an interstate carrier by railroad and that the injured employe was at the time of the accident employed by that carrier, but it must also appear that at the moment of the accident the employe was employed in interstate commerce as defined by this Court.

However counsel, after stating this truism, seems inclined to stray away from the record in the instant case, the facts in which we do not desire to have lost sight of.

The California Workmen's Compensation, Insurance & Safety Act, as it stood at the time of the accident and until after the coming down of the opinion of the California Supreme Court here under review, is Chap. 176 of the California Laws of 1913,

as amended by Chap. 607 of the California Laws of 1915 and Chap. 586 of the California Laws of 1917. This Act confers on the Commission both administrative and judicial powers as to cases within its jurisdiction. It provides for notice, taking of testimony, a hearing, and written findings and award. It also provides that before an award can be assailed in court the party aggrieved must apply to the Commission for and be denied a rehearing. The only method by which the Commission's award may be reviewed is by the Supreme Court of the State or a District Court of Appeal on a writ of certiorari, called in the Act a Writ of Review. As to court review it is specifically provided:

> "The review shall not be extended further than to determine whether:
>
> (1) The commission acted without or in excess of its powers.
>
> (2) The order, decision or award was procured by fraud.
>
> (3) The order, decision, rule or regulation was unreasonable.
>
> (4) If findings of fact are made, such findings of fact support the order, decision or award under review.
>
> (c) The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission. The Commission and each party to the action or proceeding before the Commis-

sion shall have the right to appear in the review proceeding. Upon the hearing the Court shall enter judgment either affirming or setting aside the order, decision or award or may remand the case for further proceedings before the Commission."

The revisory or reviewing power of the California courts has been considered by the Supreme Court of California in a number of cases, the effect of which is summarized in *Cardoza* vs. *Pillsbury, et al., constituting the Industrial Accident Commission,* 169 Cal. 106:

> "The COURT. The application for a review by this Court of the proceedings of the Industrial Accident Commission of the state of California states no ground upon which this Court is authorized to entertain the same. The grounds stated, namely, that the findings of the Commission are not sustained by the evidence, and that the applicant has discovered new evidence material to him, are grounds upon which the Commission itself may grant a rehearing (Workmen's Compensation Act, Sec. 82), but the Courts are restricted to the grounds stated in Section 84 of said Act.
>
> The application for a writ is denied for these reasons."

In the case at bar the Supreme Court of California was therefore restricted to determining whether on the facts found by the Commission the employe was or was not employed in interstate commerce at the time of his injury. If he was so employed, the Com-

mission, by virtue of the express provisions of Section 69 of the Act quoted under the first subdivision of this brief, had no jurisdiction. The record before the California Supreme Court showed that on the hearing before the Commission it was stipulated (printed record, pp. 36 and 37) (italics ours):

> "1. That William T. Butler was in the employment of the Southern Pacific Company on June 21, 1917;
>
> 2. That defendant employer did not carry compensation insurance;
>
> 3. That on June 21, 1917, at Oakland, California, while in the course of his employment, William T. Butler received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injuries which resulted in his subsequent death on June 23, 1917;
>
> 4. That said injuries causing death arose out of and happened in the course of the employment and while the employee was performing service growing out of, incidental to and while acting in the course of the employment as such and was not caused by his wilful misconduct or intoxication;
>
> 5. That medical treatment was furnished by the defendant.
>
> 6. That the defendant had notice of the happening of the injury within the time prescribed by law;
>
> 7. That the age of the deceased employee was 37 years and his occupation that of electric lineman;

8. That the average annual earnings of the deceased employee were $1,508.84;

9. That no death benefit has been paid;

10. That this applicant Mary E. Butler and Albert Nelson Butler were the wife and son of said deceased upon whom they were totally dependent for support at the time of said employee's death and that there are no other dependents;

11. That the burial expense of said deceased employee was $266.00, which was paid by the International Brotherhood of Electric Workers, said deceased being a member of that organization, and that organization provides for the funeral expenses of its deceased members;

12. That the defendant Southern Pacific Company is a corporation organized under the laws of the state of Kentucky and is engaged in the operation of a system of steam railroad as a common carrier of freight and passengers for hire between the states of California, Oregon, Nevada, Utah, Arizona and New Mexico, and was so engaged on June 21st, and prior thereto, 1917;

13. That at the time the deceased met his death that the Southern Pacific maintained what is known as a main power house at or near Fruitvale, Alameda County, California; that at this power house the electricity used by the Southern Pacific Company in the operation of its electric cars in Alameda County is manufactured and from said power house transmitted by main lines to its West Oakland sub-station and to its Berkeley sub-station, at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the

Southern Pacific Company on its different electric lines in Alameda County, California; that the said deceased at the time he received his injury which produced his death was working on one of the main lines by which the electricity is transmitted from Fruitvale to West Oakland and Berkeley sub-stations *and was doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted.*"

Following this stipulation the testimony shown on pages 38 to 61, inclusive, of the printed record was submitted on the issue as to whether the Southern Pacific Company's electric lines in Alameda County were engaged in interstate commerce at the time of the accident. On the testimony, including the stipulations, the Commission found (*Commission's Findings and Award,* printed record, pages 32-35) as follows (page 33) (italics ours):

"*Findings of Fact.*

1. That William T. Butler, husband of Mrs. Mary E. Butler, one of the applicants herein, was injured on the 21st day of June, 1917, at Oakland, California, while in the employment of defendant, Southern Pacific Company, as an electric lineman.

2. That said injury arose out of and happened in the course of said employment, was proximately caused thereby, and occurred while the injured employee was performing service growing out of and incidental thereto.

3. That said injury occurred in the manner and under conditions and circumstances as follows: said employee received an electric shock

while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death on June 23, 1917; that at the time said employee sustained said injury the defendant maintained a main power house at or near Fruitvale, Alameda County, California; that at said power house the electricity used by defendant in the operation of its electric cars in said Alameda County is manufactured and from said power house transmitted by main line to its West Oakland sub-station and to its Berkeley sub-station, at which point the electricity is reduced and transmitted direct to the trolley wires which operate the electric cars of the defendant on its different lines in said Alameda County; *that the said employee at the time he received his said injury was working on one of the main lines by which the electricity is transmitted from said Fruitvale to West Oakland and Berkeley sub-stations and was doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted as aforesaid;* that at the time of said injury the said defendant was a common carrier by railroad engaged in interstate commerce between different states of the United States; *that said electric cars were used at the time of said injury for both interstate and intrastate commerce;* that while said employee was working as aforesaid between said power house and said sub-station the electricity which caused said electric shock had not reached its point of distribution to the said electric cars (Note, *i. e.,* presumably meaning the trolley wires) and he was employed in work preliminary to the running of said electric cars; and that, therefore, he was not employed in interstate commerce."

It will be observed that the Commission specifically found:

(a) That the deceased at the time he was killed was working on a main line by which electric current was transmitted from the power house to the sub-station, through which it proceeded on an uninterrupted course to the motors of the cars; and

(b) That he was then "doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted as aforesaid;" and

(c) That at the time of said injury the said defendant was a common carrier by railroad, engaged in interstate commerce, and that the cars were used at the time of said injury for both interstate and intrastate commerce.

The finding of the Commission that because the electricity that caused the shock to the deceased had not reached its "point of distribution" to the electric cars the deceased was employed in work *preliminary* to the running of said electric cars, is, we respectfully submit, an erroneous conclusion of law and not a finding of fact.

Counsel relies on three decisions of this Court, the facts in each of which are entirely different from those of the case at bar. The first is the case of *Chicago, Burlington & Quincy Railroad Co.* vs. *Har-*

rington, 241 U. S. 177. In the *Harrington* case this Court quotes the statement of facts by the state Court as follows:

> "Defendant owns and operates a system of railroads covering this and a number of other Western States and is a common carrier of both interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars used in both kinds of traffic are received, sent out, cared for and repaired in the yards. The switching crew of which Harrington was a member did not work outside of this state and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic. It may be conceded, as argued by defendant, that none of its locomotives or cars was set apart for service only in intrastate commerce. Defendant operated local trains from Kansas City to terminal points in this state which carried only intrastate commerce, but the locomotives and cars of such trains were subject to be diverted to other trains engaged in interstate commerce,"

and adds to that statement the observation that it may be assumed for the purposes of the case that there was no evidence that any of the locomotives

supplied with fuel from the coal chutes were engaged exclusively in intrastate commerce, or that any of the defendant's trains within the state were engaged exclusively in that commerce.

The *Harrington* case, we respectfully submit, is clearly distinguishable from the case at bar because there there was merely a storage of fuel against future needs, while here, as expressly found by the Industrial Accident Commission, the deceased was engaged in facilitating the movement of an electric current which at that moment was proceeding with the speed of light to its actual employment in the motors of cars then carrying interstate commerce.

The respondents next rely on *Delaware, Lackawanna & Western Railroad Co.* vs. *Yurkonis,* 238 U. S. 439, the facts in which are still further removed from those of the case at bar than are the facts in the *Harrington* case, *supra.* In the *Yurkonis* case the plaintiff was injured while blasting coal in a coal mine owned by the railroad, the product of which was consumed by its locomotives and engines used in its business as a common carrier in interstate commerce. That states the case as favorably for the plaintiff as the record justifies. This Court there says that:

> "The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and trans-

> ported did not make the injury one received by the plaintiff while he was engaged in interstate commerce."

There was in the *Yurkonis* case no such direct facilitation of or connection with a commerce actually being carried on as was found by the Commission in the case at bar. The coal *Yurkonis* was mining might never have reached an interstate locomotive. The appliances on which deceased in the instant case was "doing work that was necessary to keep said main electric lines in a workable and useable condition" were actually then and there devoted to and instrumentalities of interstate commerce, and the energy then flowing through the line attached to those appliances was immediately in use in interstate commerce.

As said in the dissenting opinion of the California Supreme Court (printed record, pp. 70-71):

> "The deceased was engaged in working upon an insulator that supported a wire that was actually in use in moving trains engaged in interstate commerce and was killed by a fall resulting from a shock caused by the escape of some of the current so used. * * *
>
> So the question here is, 'Was the power passing along the power line the proximate cause of the motion of the trains?' If so, those engaged in operating and maintaining the devices by which the power is transmitted would, upon the principle above stated, be engaged in interstate commerce. That this power so transmitted was

> the proximate cause of the movement of the trains would seem to be conclusively answered in the affirmative by the fact that any break in the power line instantaneously affects the moving trains."

The respondents further call to their aid in support of their argument that this is a case of remoteness from interstate commerce, the decision of this Court in *Shanks* vs. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556. The facts in the *Shanks* case are stated by this Court to have been:

> "The facts in the present case are these: The railroad company was engaged in both interstate and intrastate transportation and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead counter-shaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work."

Relief was denied because the immediate work was too remote from the commerce then being carried on.

The foregoing reviews the decisions of this Court mainly relied upon by respondents, with the exception of *Lehigh Valley Railroad Company* vs. *Barlow*, 244 U. S. 183, which was decided on the authority of

the *Harrington* case, *supra,* and the syllabus of which sufficiently differentiates it from the case at bar:

> "An employee is not engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, when his work at the time of injury consists in placing cars owned by the carrier, containing its supply coal, upon an unloading trestle within its yards, and when the interstate movement of the cars carrying the coal occurred as long as seventeen days previously and the cars, with the coal, in the meantime, have remained upon sidings and switches in the yards."

Counsel for the respondent Commission fails to call attention to the finding of the Commission on the stipulation of the parties that the deceased was "doing work that was necessary to keep said main electric lines in a workable and useable condition in order that the electricity might be transmitted." We attribute this failure to inadvertence, as otherwise we cannot understand the statement on page 11 of respondents' brief, "An added consideration establishing remoteness from interstate commerce lies in the fact that deceased at the time of his injury was not directly facilitating the transmission of power." If keeping an instrumentality for the transmission of power in a "workable and useable condition" while the energy is flowing through it is not in facilitation of such transmission we cannot imagine what acts counsel would have included within the term "facilitation."

Counsel endeavors to argue that the transmission of electricity over a power line through which the electric energy is flowing to its use in interstate commerce is comparable with the pumping of oil from a well or the mining of coal in a mine. The distinction is so obvious that we feel that no further comment is needed except to call attention to the apt distinction drawn by the dissenting opinion between potential and kinetic energy.

Counsel refers also to *Minneapolis & St. Louis Railroad* vs. *Winters,* 242 U. S. 353. In that case the engine, which was being repaired, was held not to be an instrumentality of interstate commerce during such repairs because there was no showing that it had theretofore been assigned to that commerce or that it would subsequently be used in such commerce. In the case at bar the power line and insulators were not only actually "devoted" or "dedicated" to interstate commerce, but were at the time, as found by the Commission, then being used in interstate commerce, which brings the case within the reasoning of this Court in the *Second Employers' Liability Cases,* 223 U. S. 1, and the other and later decisions we cite.

On page 16 of respondents' reply brief they suggest that the record does not disclose whether the Southern Pacific maintained a storage battery system or a reserve power house in case of failure of its ordinary supply of electricity. If that were im-

portant and if the record did not disclose this fact, it might be assumed that no such storage existed, as it is common knowledge that trolley lines are not operated by or from storage batteries, but as a matter of fact, the record shows by the uncontradicted testimony of the witness Johansen (printed record, 60, marginal page 98), as well as by the Commission's findings (*ante*), that the electric energy that was flowing through the line on which the deceased was working went directly through the reducing station into the trolley wires.

Although much discussed then and since, the decision in *Pedersen* vs. *Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146, has been upheld by this Court whenever it has had occasion to refer to or consider that case. It is the first of the so-called "repair cases" under the Federal Employers' Liability Act in which a thorough discussion was had. It will be remembered that in that case the injured employe was carrying bolts to repair a railroad bridge and it was held that he was employed in interstate commerce. It is said by the Court (page 152) (italics ours):

> "True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; *nor does its double use prevent the employment of those who are engaged* in its repair or *in keeping it in suitable condition for use from being an employment in interstate commerce.*

> The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

In the case at bar we have the express finding by the Commission that the work Butler was doing when he was killed was work "that was *necessary* to keep said main electric lines in a *workable* and useable *condition*, in order that the electricity might be transmitted as aforesaid."

It may be stated as a general principle now well established that all section men and track laborers while working on or repairing any part of the track or switches used by a common carrier of railroad indiscriminately for both interstate and intrastate commerce are employed in interstate commerce within the meaning of the Federal Employers' Liability Act. Supporting this statement are the following cases:

> *New York Cent. R. Co.* vs. *Winfield,* 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546;

St. Joseph & G. I. R. Co. vs. *United States,* 146 C. C. A. 397, 232 Fed. 349;

Philadelphia, B. & W. R. Co. vs. *McConnell,* 142 C. C. A. 555, 228 Fed. 263;

Columbia & P. S. R. Co. vs. *Sauter,* 139 C. C. A. 150, 223 Fed. 604;

Lombardo vs. *Boston & M. R. R.,* 223 Fed. 427;

Tralich vs. *Chicago, M. & St. P. Ry. Co.,* 217 Fed. 675;

San Pedro, L. A. & S. L. R. Co. vs. *Davide,* 127 C. C. A. 454, 210 Fed. 870;

Central R. Co. of New Jersey vs. *Colasurdo,* 113 C. C. A. 379, 192 Fed. 901;

Zikos vs. *Oregon R. & Nav. Co.,* 179 Fed. 893.

In *Southern Railway Co.* vs. *McGuin,* 240 Fed. 649, it is held that a section man who was working with a road engineer in setting stakes with the view of improving a curve by a slight change in track, was employed in interstate commerce.

In *St. Louis, San Francisco & Texas Railway* vs. *Seale,* 229 U. S. 156, a clerk was held to be employed in interstate commerce when he was on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so that the switching crew would know what to do with them when breaking up the train.

Indeed, in the *Shanks* case (239 U. S. 556), so much relied upon by respondents here, this Court says:

> "It is plain that Shanks was not employed in interstate transportation, or in repairing or *keeping in useable condition* a roadbed, bridge, engine, car or other instrument *then in use* in such transportation." (Italics supplied.)

The finding of the respondent Commission in the case at bar uses the same expression used by this Court in the *Shanks* case: "necessary to keep said main electric lines in a workable and *useable condition.*"

We have referred to no opinions by state courts, nor do we analyze those cited by counsel, not only because there is a lack of uniformity in the opinions of state courts in applying the principles established by this Court under the Federal Employers' Liability Act, but also because we feel that the rules laid down by this Court are sufficiently comprehensive and definite to enable any unprejudiced mind to classify a given case when the facts are, as here, clearly established.

The respondents' attempt to classify the deceased as an intrastate employe because he was between the power house and the reducing station, instead of being between the reducing station and the trolley wire, is, we believe, and have attempted to show in our Opening Brief, an entirely impracticable distinc-

tion. The reducing station is nothing more than a transformer on a large scale, a transformer such as one often sees on a pole in a city street. It does not change the energy from electric energy to something else. It merely changes the character and intensity of the energy, and it is common knowledge that the transmission of the energy from the power house through the transformer to the trolley wires and through the trolley pole to the car motors is as speedy as light itself.

Congress, according to the decisions we have cited, intended that every act of labor performed in repairing or keeping in useable condition an instrumentality of interstate commerce should be regarded as an act of interstate commerce, wherein there arises no question of blended employment or remoteness. The work now considered was entirely interstate in character. That this was the intention of Congress is adverted to by this Court in the *Pedersen* case, 229 U. S. 146, *passim,* and particularly on page 151, where it calls attention to the fact that the very statute then before it charged the carrier with the duty of exercising appropriate care "to prevent or correct any defect or insufficiency * * * in its cars, engines, appliances, * * * used in interstate commerce."

III.

The decision here reviewed should be annulled.

It is respectfully submitted that the deceased was employed in interstate commerce at the time of the fatal accident, that the claim of his dependents is justiciable solely under the Federal Employers' Liability Act, and that the affirmance of the Commission's award by the Supreme Court of the State of California should be annulled, with directions to that Court to transmit such annulment to the Industrial Accident Commission.

Respectfully submitted,

HENLEY C. BOOTH,
Attorney for Petitioner.

WM. F. HERRIN,
Of Counsel.

Dated San Francisco, California, this first day of November, A. D. 1919.

SOUTHERN PACIFIC COMPANY *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 118. Submitted December 18, 1919.—Decided January 5, 1920.

Certiorari is the proper means of reviewing a judgment of a state court affirming an award against a railroad company under a workmen's compensation law, where the federal question upon which the applicability, as distinct from the validity, of that law depends, is whether the injured employee was engaged in interstate commerce. P. 262.

A lineman engaged in the necessary work of wiping the insulators supporting a main wire, in use at the time as a conductor of electricity which, flowing from it through a transformer, and thence along the trolley-wires of a railroad, moved cars in interstate and intrastate commerce, *held* employed in interstate commerce, within the Federal Employers' Liability Act. *Id.*

178 California, 20, reversed.

THE case is stated in the opinion.

Mr. Henley C. Booth and *Mr. William F. Herrin* for petitioner.

Their argument, respecting the jurisdiction, may be summarized as follows:

The validity of the state law was not drawn in question but was conceded. By its own terms it does not apply if the federal act does. Laws Calif., 1917, c. 586, § 69 (c). Neither was the "authority" of the State exercised by its tribunals to hear the case drawn in question. Merely the result of their determination is assailed, on a federal ground. The petitioner set up a "right, privilege, or immunity" under the federal act, and the finding against the validity of that claim is reviewable by certiorari, under § 237, Jud. Code, as amended in 1916. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Stadelman* v. *Miner*, 246 U. S. 544; *Cave* v. *Missouri*, 246 U. S. 650; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477–481; *Ireland* v. *Woods*, 246 U. S. 323–330.

Mr. Christopher M. Bradley and *Mr. Warren H. Pillsbury*, for respondents, contended that writ of error was the proper remedy and that certiorari would not lie.

On the merits:

Injuries sustained by a railroad employee while repairing a car or locomotive then in use in interstate commerce are within the federal act. *Walsh* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1. But injuries sustained while caring for machinery or shops used in the repair of such cars or locomotives are not within the federal act. *Illinois Central R. R. Co.* v. *Cousins*, 241 U. S. 641, reversing 126 Minnesota, 172; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, reversing 214 N. Y. 413; *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183, reversing 214 N. Y. 116.

Nor are injuries sustained while repairing cars or locomotives used indiscriminately in interstate and intrastate commerce but out of service for repairs. *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353; *Baltimore*

& Ohio R. R. Co. v. *Branson*, 242 U. S. 623, reversing 128 Maryland, 678.

The repair of tracks, tunnels or bridges then in use for interstate and intrastate commerce comes within the federal act, *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146; while the construction of a new track, tunnel or bridge, prior to its being opened for interstate commerce, does not, *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, *dictum; New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Minneapolis & St. Louis R. R. Co.* v. *Nash*, 242 U. S. 619; *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43.

Similarly, the coaling of an interstate locomotive is within the federal act. *Armbruster* v. *Chicago, Rock Island & Pacific Ry. Co.*, 166 Iowa, 155; *Southern Ry. Co.* v. *Peters*, 194 Alabama, 94. But the mining of coal in the railroad company's mine or its transportation within the State to chutes from which it is to be loaded upon interstate locomotives is not. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183; *Zavitovsky* v. *Chicago, M. & St. P. Ry. Co.*, 161 Wisconsin, 461.

The general line of demarcation appears to be that the service must be directly connected with the interstate transportation and not preliminary to it. Stated in another way, the service must be proximately and immediately connected with interstate commerce.

In this case the service was important, but importance is not the test. It was too remote from interstate commerce. The case is the same in principle as the *Harrington* and *Yurkonis Cases, supra.* The differences between coal and electricity as power are legally unimportant. They are differences of degree only. The difference in rapidity of movement becomes, upon final analysis, but a difference in reserves maintained.

See *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183; *Barker* v. *Kansas City, M. & O. Ry. Co.*, 94 Kansas, 176; *Giovio* v. *New York Central R. R. Co.*, 162 N. Y. S. 1026; *Zavitovsky* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 161 Wisconsin, 461; *Gallagher* v. *New York Central R. R. Co.*, 167 N. Y. S. 480; *Kelly* v. *Pennsylvania R. R. Co.*, 238 Fed. Rep. 95.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

William T. Butler, husband of respondent Mary E. Butler, was killed at Oakland, California, while employed by the Southern Pacific Company as an electric lineman. The Supreme Court of the State affirmed an award rendered by the California Industrial Commission against the company, and the cause is properly here by writ of certiorari.

The fatal accident, which occurred June 21, 1917, arose out of and happened in the course of deceased's employment. He "received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death." At that time the company, a common carrier by railroad, maintained a power house at Fruitvale, California, where it manufactured the electric current which moved its cars engaged in both interstate and intrastate commerce. From the generators this current passed along main lines or cables, through a reduction and transforming station, to the trolley wires, and thence to the motors. When he received the electric shock, deceased was engaged in work on one of the main lines necessary to keep it in serviceable condition. If such work was part of interstate commerce, the Workmen's Compensation Act of the State is inapplicable and the judgment below must be reversed. Otherwise, it must be affirmed. Employers' Liability Act,

April 22, 1908, c. 149, 35 Stat. 65; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *New York Central R. R. Co.* v. *Porter*, 249 U. S. 168.

Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 151; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558; *New York Central R. R. Co.* v. *Porter*, *supra*; *Kinzell* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 250 U. S. 130, 133.

Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE CLARKE dissents.